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**MINNESOTA REPORTS**

**VOL. 143**

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**CASES ARGUED AND DETERMINED**

**IN THE**

**SUPREME COURT**

**OF MINNESOTA**

**JUNE 6—OCTOBER 17, 1919**

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**HENRY BURLEIGH WENZELL**  
**REPORTER**

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**SECRETARY OF THE STATE OF MINNESOTA, IN TRUST FOR THE BENEFIT OF THE  
PEOPLE OF SAID STATE**

**(143 M.)**

**JUN 10 1921**

**JUSTICES  
OF  
THE SUPREME COURT  
OF MINNESOTA  
DURING THE TIME OF THESE REPORTS**

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**Hon. CALVIN L. BROWN, Chief Justice  
Hon. ANDREW HOLT  
Hon. OSCAR HALLAM  
Hon. JAMES H. QUINN  
Hon. HOMER B. DIBELL**

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**COMMISSIONERS  
appointed under Laws 1913, p. 53, c. 63  
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Hon. EDWARD LEES**

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**HERMAN MUELLER, Esq., Clerk**

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**ATTORNEY GENERAL  
Hon. CLIFFORD L. HILTON**

## NOTE

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*By G. S. 1913, § 137, the reporter is required to report all cases decided by the court.*

*Pursuant to G. S. 1913, § 123, the headnote in each case is prepared by the justice or commissioner writing the opinion, except where otherwise noted.*

*With a few exceptions the cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of court.*

*As required by G. S. 1913, § 137, when any Minnesota case has been printed in the periodical known as "The Northwestern Reporter," and is cited in any opinion in this volume, a reference to the book and page of that periodical where such case appears has been inserted in such opinion. A similar citation for each opinion in this volume has been given in a footnote.*

*In citations from the first twenty volumes of the Minnesota Reports the page of the original edition is given, preceded by the corresponding page of the edition by Chief Justice Gilfillan.*

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BY ORDERS MADE IN OPEN COURT, THE OPINIONS  
WRITTEN BY THE COMMISSIONERS AND REPORTED IN  
THIS VOLUME WERE ADOPTED AS THE OPINIONS OF  
THE COURT BEFORE THEY WERE FILED, AND HAVE  
THE SAME FORCE AND EFFECT AS THOUGH WRITTEN  
BY A JUSTICE OF THE COURT.

FOR TABLE OF STATUTES CITED BY THE COURT  
SEE INDEX, PAGES 584-587.

## AMENDMENT TO COURT RULES

On March 11, 1920, the supreme court ordered that Rule 1 of the rules of practice be amended by adding thereto subdivision 6 as follows, to wit:

6. **Certiorari—Title of Cause.** The petition for a writ of certiorari, when issued from this court and directed to a lower court or a judge thereof, shall be entitled in the case or proceeding in which the writ is sought, shall definitely and briefly state the judgment or order or proceeding which it is sought to review and the errors which the relator claims. The writ shall be likewise entitled, shall refer to the order or judgment or proceeding sought to be reviewed, shall state the errors which are claimed, shall issue in the name of the state on the relation of the petitioner, and shall direct a return of the proceedings to this court. The writ and petition shall be served upon the court or judge to which it is directed and upon the adverse party in interest. The court or judge shall make return thereto. In this court the style of the case under review shall be as in the court below. If the plaintiff below is the relator he shall be designated in this court as plaintiff and relator and the defendant shall be designated as defendant and respondent; and if the defendant is the relator he shall be designated in this court as defendant and relator and the plaintiff shall be designated as plaintiff and respondent. When the writ is directed to a court, or officer or tribunal acting judicially, to review a proceeding in which the adversary parties are not designated as plaintiff and defendant, the title of the action or proceeding below shall be preserved in this court. In no case when the writ is directed to a court or other tribunal shall the title appear as *State ex rel.* the relator against such court, officer or tribunal; but the writ shall issue in the name of the state upon the relation of the relator and shall be directed to such court, officer or tribunal and direct a return of the proceedings.

Records and briefs shall be printed and served, unless the order directing the writ or a subsequent order otherwise provides, as now prescribed by rule 8; and upon the return day of the writ the court will fix the date of argument. The attendance of counsel on the return day is unnecessary; but a suggestion may be made by letter or otherwise as to the desired date of argument.

Costs shall be taxed for or against the adversary parties but not for or against the court or a judge thereof.



**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF MINNESOTA.**

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**ROBERT STAVANAU v. WILLIAM GRAY.<sup>1</sup>**

June 6, 1919.

No. 21,170.

**Deed — description by metes and bounds — riparian rights on meandered lake.**

1. A deed to land, located in a government lot bordering upon a meandered lake, described by metes and bounds, without any reference to the lake, in the absence of a showing to the contrary, conveys only the land embraced within the lines of the description and does not carry with it any riparian rights.

**Same — intent of parties — parol evidence inadmissible.**

2. In arriving at the intention of the parties to a deed of land in a government lot bordering upon a meandered lake, the conveyance must be read and considered in the light of existing conditions, and parol evidence of the intention of the parties is inadmissible.

Action in the district court for Le Sueur county to restrain defendant from entering certain land under claim of ownership and from interfering with plaintiff or his servants in removing fences or obstructions placed thereon by defendant. The answer alleged ownership by defendant of the land in dispute, with all riparian rights, for more than 15 years by exclusive, hostile and adverse possession under claim of title. The case was tried before Tift, J., who made findings and ordered judg-

<sup>1</sup>Reported in 172 N. W. 885.

ment dismissing the action. From an order denying his motion for a new trial, plaintiff appealed. Reversed.

*Moonan & Moonan*, for appellant.

*Thomas Hughes* and *S. B. Wilson*, for respondent.

QUINN, J.

Action to enjoin defendant from trespassing upon the tract of land in controversy. The trial court made findings and ordered judgment in favor of the defendant. From an order denying his motion for a new trial plaintiff appeals.

Round lake is a small meandered body of water located within sections 29 and 30. It extends west to within about 36 rods of the center of section 30. Government lot 2 of section 30 abuts upon the north shore of the lake and embodies that portion of the southeast quarter of the northeast quarter of the section lying outside of the meander line; lot 3 abuts upon the west and south shore and embodies that portion of the northwest quarter of the southeast quarter of section 30 lying outside of the meander line, and lot 4 abuts upon the south shore and embodies that portion of the southeast quarter of the southeast quarter of section 30 lying outside of the meander line.

On October 30, 1905, Joseph Warner was the owner of the south 33 acres of lot 2 and all of lots 3 and 4 of section 30. On that day he sold and conveyed to the plaintiff lot 4 and all of lot 3, except seven acres on the west side described by metes and bounds in the deed. Subsequently Warner sold and on August 2, 1911, conveyed the south 33 acres of lot 2 and the seven acres which he had retained in lot 3, to defendant by the following description: The south 33 acres of lot 2; also commencing at the center of section 30, thence east 36 rods (A); thence south  $9\frac{1}{2}$  degrees west 12 rods (B); thence west 15 rods; thence south 35 degrees west 13 rods; thence south 52 rods (C); thence west 10 rods 18 links; thence north 75 rods to the place of beginning, containing seven acres, all lying in section 30, the identical description by which the same was exempted from the above conveyance of lot 3 to plaintiff. The line AB, as above indicated, is along the west bank of the lake, partly upon ground several feet higher than the water. The section corner stakes are lost and the meander line is in dispute. The water in the

lake has receded so that at the time of the trial it was 40 feet distant from the line AB. The strip of land in controversy lies immediately to the east of the above line and is about 35 feet wide and 12 rods long. Prior to Warner's ownership of lot 3, a fence had been built from point C along the east side of the seven acres to point B, and thence east to the water in the lake, and also one parallel therewith and extending to the line AB, forming a lane 20 feet wide for the owner's cattle to pass from his premises west of lot 3 to a pasture on the east portion of lot 2.

It is the contention of the plaintiff that he acquired, under his deed from Warner, all riparian rights pertaining to lot 3, and that defendant acquired, under his deed from Warner, only the seven acres within the lines constituting the description thereof by metes and bounds. Upon the other hand, it is the contention of the defendant that the eastern line of the seven acres extending from A to B is upon and along the shore of the lake, which entitles him to the accretion by the recession of the water in the lake, even though the description in his deed is by metes and bounds.

It is undisputed that Warner, the common grantor of the parties to this action, was, on the thirtieth of October, 1905, the owner in fee of all of lot 3, and that whatever interest either of the parties to this action acquired therein was derived through their respective deeds from him. It is well settled in this state that the owner of a government lot abutting upon a meandered body of water may sever the riparian rights and convey the same separate from the shore. *Hanford v. St. Paul & D. R. Co.* 43 Minn. 104, 42 N. W. 596, 44 N. W. 1144, 7 L.R.A. 722; *Bradshaw v. Duluth Imperial Mill Co.* 52 Minn. 59, 53 N. W. 1066; *Gridley v. Northern Pacific Ry. Co.* 111 Minn. 281, 126 N. W. 897.

The trial court found that the defendant, under his deed from Warner, acquired the riparian rights or accretion appurtenant to the seven-acre tract, which includes the ground in controversy. The sole question here for consideration is, whether the finding is sustained by the evidence. The answer to this question depends upon whether the deed from Warner to the defendant carried with it the riparian rights appurtenant to the land bordering on the line AB.

This calls for a construction of the deeds by which Warner conveyed lot 3, for the purpose of ascertaining the intentions of the parties thereto

and determining what interest therein was conveyed by each instrument, which must be done by reading them in the light of the facts and circumstances existing at the time the same were made. Warner obtained title to lot 3 from two sources and by the same descriptions by which he conveyed the same. He never occupied or used the premises for any purpose. He deeded government lot 4 "and all of lot three (3) government survey in said section thirty (30) except seven (7) acres on west side of said lot three (3) by metes and bounds as follows. \* \* \*" The description of the tract of land exempted from this conveyance could hardly be made more specific. It exempts seven acres of ground and then describes the same in detail by metes and bounds. The mere fact, if it be a fact, that 36 rods east from the center of the section is the meander line would not be sufficient to overcome the definite description of the exemption. If the grantor wished to retain the riparian rights appurtenant to the seven acres, he could easily have made reference to the shore of the lake for the purpose of indicating such intention.

The existence of the fence referred to is not, of itself, such as to qualify or overcome the terms of the deed to plaintiff with reference to the intent of the parties as to the property conveyed. The same reasoning applies to the deed from Warner to the defendant. Following the description by metes and bounds in the deed to defendant appears the statement "containing seven (7) acres." There can be no serious question about the amount of land intended to be conveyed by this deed. In this connection it will be noted that the north line of the seven acres constitutes the south line of the 33 acres in lot 2, conveyed to defendant by the same instrument.

The case comes within the rule applied in *Owaley v. Johnson*, 95 Minn. 168, 103 N. W. 903, and *Gridley v. Northern Pacific Ry. Co.* 111 Minn. 281, 126 N. W. 897. As held in the latter case, if the deeds in question be construed and considered in the light of the existing circumstances under which they were made, the conclusion follows that the parties intended to convey in accordance with the descriptions contained therein. As to the general rule in determining what is included in a description by metes and bounds, see 9 *Corpus Juris*, 224, paragraph 155, and cases cited.

Had reference to the shore line of the lake been made in either con-

veyance as forming a boundary to the seven acres, quite a different case might be presented. The entire lot being held by a common grantor and the descriptions in both instruments being definite and clear as to the amount of land conveyed and as to the boundaries thereof, the same is not overcome by the existence of the fence upon the boundary line, or by the fact that the easterly line is in close proximity to the meander line. Parol evidence was not admissible to contradict the terms of the deed or to show a different intention on behalf of the parties thereto. It follows that the finding of the trial court is not supported by competent evidence and a new trial must be granted.

Reversed.

HALLAM, J. (dissenting).

I dissent. The court found that the boundary line of course number 2, referred to in the opinion as the line AB, forms and constitutes a part of the boundary line of a meandered lake known as Round lake and at the time the tract was first set apart coincided substantially with the low water line of said lake.

I think the better rule applicable to such cases is that stated in the following cases:

In *County of St. Clair v. Lovington*, 23 Wall. 46, 64, 23 L. ed. 59, the court said: "It may be considered a canon in American jurisprudence that where the calls in a conveyance of land are for two corners at, in, or on a stream or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary."

Applying this rule it was said in *McDonald v. Whitehurst*, 47 Fed. 757, 758: "This language is used by the supreme court generally of lands lying on streams, without reference to the question whether the deeds conveying them expressly call for the stream or not. If, as in the case at bar, it appears from the evidence that the land does in fact lie on a stream, the canon of law applies, whether the deed expressly declares that fact or not."

I think it should be held that the lake is the boundary of the seven acre tract. The surrounding circumstances and practical construction of the parties seem to me to confirm this construction.

JOHN LUING v. M. O. PETERSON.<sup>1</sup>

June 6, 1919.

No. 21,174.

**Consideration — promise to pay another's debt.**

A promise to pay the antecedent debt of another must be supported by some new consideration. A loan of money by defendant to plaintiff was not a sufficient consideration to support a promise by plaintiff to pay certain debts of her son which defendant held for collection.

Action in the district court for Yellow Medicine county to cancel certain notes and the mortgages executed by Ragnhild B. Sorrenson, incompetent. The case was tried before Qvale, J., who made findings and ordered judgment as stated at the end of the first paragraph of the opinion. Defendant's motion for amended findings was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

*J. N. Johnson*, for appellant.

*A. C. Severson* and *O. A. Lende*, for respondent.

**PER CURIAM.**

Defendant is a collector at Canby, Minnesota. He held for collection more than a score of claims against Barney Sorrenson, amounting in the aggregate to over \$1,400. In April, 1916, Barney Sorrenson desired to go to Rochester, Minnesota, for medical treatment. For the purpose of paying his expenses his mother Ragnhild Sorrenson applied to defendant for a loan of \$200, offering to give a mortgage on certain real estate. Defendant agreed to make the loan if Ragnhild Sorrenson would "secure up the debts of Barney" which he held for collection, by a mortgage on the same property, and she assented. Defendant made the loan and Ragnhild Sorrenson gave two notes and mortgages, one for \$1,015, securing the loan and part of the claims; the other for \$635.60, securing the balance of the claims. Both mortgages bore the same date and were executed at the same time and as part of the same transaction. Both

<sup>1</sup>Reported in 173 N. W. 692.

notes were payable one year after date. There is no evidence that defendant had any authority to extend the time of the payment of the claims held by him. Ragnhild Sorrenson was then an old lady 88 years old. She was not then under guardianship. Plaintiff has since been appointed guardian of her estate. He brought this action to set aside the notes and mortgages. The court granted this relief, except as to the money advanced by defendant.

There is no claim made on this appeal that plaintiff was incompetent at the time of the giving of the mortgages or that she was imposed upon. Apparently the security she had would have secured the loan she wanted from any money lender. She is said to have stated at the time of the loan that she intended that her son should have this property. The sole ground of the court's decision was that the notes and mortgages were without consideration, except to the extent of the amount advanced by defendant. This is the question on this appeal.

A naked collateral promise of Ragnhild Sorrenson to pay her son's debts would be unenforceable. *Security Bank of Minnesota v. Bell*, 32 Minn. 409, 21 N. W. 470; *Turtle v. Sargent*, 63 Minn. 211, 65 N. W. 349. To support a promise to pay the debt of another previously incurred, there must be some new consideration. An agreement to extend the time of payment or to forbear to sue would furnish such a consideration, *Nichols & Shepard Co. v. Dedrick*, 61 Minn. 513, 63 N. W. 1110, but it is not shown that the agreement for extension was binding on the owners of these claims. See *Mason v. Edward Thompson Co.* 94 Minn. 472, 103 N. W. 507.

A majority of the court are of the opinion that the making of the new loan to Ragnhild Sorrenson was not a sufficient consideration for her promise to pay the debts of her son which defendant held for collection, and that the notes and mortgages which she gave therefor are void and unenforceable obligations.

Justices Hallam and Dibell dissent. They are of the opinion that the loan of money to Ragnhild Sorrenson was a sufficient consideration to support, not only a promise to repay the money loaned, but to support the promise to pay the other debts as well. See *Bennett v. Morse*, 6 Colo.



App. 122; Barton v. Farmers' & Merchants' Nat. Bank, 123 Ill. 352;  
Loewen v. Forsee, 137 Mo. 29.

Judgment affirmed.

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**J. I. CASE THRESHING MACHINE COMPANY v.  
J. G. BARGABOS.<sup>1</sup>**

12.

June 6, 1919.

No. 21,199.

**Sale — place of delivery.**

1. One who buys personal property then on the premises of a third party, must take the property where it then is, unless he stipulates for a different place or manner of delivery.

**Same — bill of sale.**

2. The buyer is not entitled to a bill of sale, unless the contract provides for it.

**Same — payment by check — remedy of seller.**

3. Where on a cash sale the buyer gives his check for the purchase price, the payment is conditioned only and if the check be not paid the seller may rescind the sale and retain or retake his goods.

**Same — rescission by seller.**

4. The seller may rescind the sale by any overt act evincing an intention to do so, and if he rescinds the sale he cannot enforce payment of the check thereafter.

**Pleading — striking out answer as sham — consideration.**

5. Where payment of the check was refused, and thereafter the seller asserted ownership of the property and offered it for sale to a third party in whose possession it then was but subsequently brought suit on the check, an answer alleging no consideration for the check should not be stricken out as sham, as the buyer's claim that the seller had rescinded the sale is not clearly shown to be unfounded.

**Same.**

6. An answer can be stricken out as sham only when it appears clearly and indisputably that there is no issue of fact for trial.

<sup>1</sup>Reported in 172 N. W. 882.

Action in the district court for Hennepin county to recover \$657.95 upon a check. Plaintiff's motion to strike out defendant's answer as sham and for judgment as for default was granted, Rockwood, J. From the judgment in favor of plaintiff, defendant appealed. Reversed.

*C. Rosenmeier*, for appellant.

*William Furst*, for respondent.

TAYLOR, C.

Plaintiff sued to recover the amount of a check executed to it by defendant. Defendant admitted the execution of the check, but alleged that there was no consideration for it. Plaintiff moved to strike out the answer as sham and for judgment as for default of an answer. The court granted the motion and rendered judgment for the amount of the check. Defendant appealed.

The facts are not much in dispute. J. G. Bargabos & Son were plaintiff's agents at Royalton, Minnesota, for the sale of tractors. One C. B. Pasch, living about seven miles from Royalton, gave an order to plaintiff for a tractor. The terms of sale seem to have been arranged and agreed upon by and between Pasch and a representative of plaintiff named Henderson. By the contract with Pasch plaintiff agreed to take an old steam engine then owned by Pasch as a part of the purchase price, but, as a part of the transaction by which plaintiff agreed to take the engine, plaintiff made a contract with defendant, whereby defendant's firm agreed to take the engine from plaintiff and pay plaintiff therefor the amount due plaintiff for the tractor over and above the amount paid in cash by Pasch. The sale to Pasch was completed and Pasch gave plaintiff a bill of sale of the engine. The amount due plaintiff from defendant's firm for the engine was agreed upon and defendant gave the check in controversy for this amount. After delivering the check, defendant demanded a bill of sale of the engine from plaintiff which was refused. Thereupon defendant notified the bank not to pay the check and pursuant to this notice the bank refused to pay it. After plaintiff had presented the check to the bank and payment had been refused, plaintiff, claiming to be the owner of the engine, offered to sell it back to Pasch on whose farm it still remained. Pasch refused to buy it, whereupon plaintiff directed him to take it to Royalton and deliver it to defendant, and brought this

suit on the check. After the suit had been commenced, Pasch took the engine to Royalton and tendered it to defendant who refused to receive it.

The contract between plaintiff and defendant contained no provision for a bill of sale, nor as to the place or manner of delivery of the engine which was then at the Pasch farm as both parties knew. While plaintiff refused to give a bill of sale, no claim is made that plaintiff did anything to prevent defendant from taking possession of the engine. Defendant was not entitled to a bill of sale, as he had not stipulated for it, and it was not necessary to pass title to the property. 35 Cyc. 161. Not having stipulated for any different place or manner of delivery, it was the duty of defendant to take the engine on the Pasch farm where it then was. Uniform Sales Act, Laws 1917, p. 779, c. 465, § 43; 24 Am. & Eng. Enc. (2d ed.) 1068; 23 R. C. L. p. 1376, § 199. The transaction was in substance a cash sale. When defendant gave his check for the full amount of the purchase price and this check was accepted by plaintiff, the sale was completed subject to the condition that the check be paid by the bank in the usual course of business. Had the check been so paid, title to the engine would have vested absolutely in defendant or his firm. But payment by check is conditional only, and, if the check be not paid, the seller in a cash sale may rescind the sale and retain or retake his goods. Laws 1917, pp. 782, 783, 786, c. 465, §§ 52, 53, 54, 61; National Bank of Commerce v. Chicago, B. & N. R. Co. 44 Minn. 224, 46 N. W. 342, 560, 9 L.R.A. 263, 20 Am. St. 566; 23 R. C. L. p. 1388, § 211.

The Uniform Sales Act provides:

"The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer." Laws 1917, p. 786, c. 465, § 61.

When payment of the check was refused, plaintiff had the right to rescind the sale and retain the engine or to affirm the sale and enforce payment of the check. Claiming ownership of the engine and offering to sell it to Pasch, was evidence tending to show an intention to rescind. If plaintiff's conduct amounted to a rescission of the sale, plaintiff was

not entitled to recover on the check, and defendant's claim of no consideration for the check was not sham but a valid defense to the suit.

An answer cannot be stricken out as sham when it appears that there is a real issue to be tried, but only when it appears clearly and indisputably that the asserted defense is wholly unsupported by the facts. *Wright v. Jewell*, 33 Minn. 505, 24 N. W. 299; *Pfaender v. Winona & St. Peter R. Co.* 84 Minn. 324, 87 N. W. 618; *Brown-Forman Co. v. Peterson*, 101 Minn. 53, 111 N. W. 733; *Estate of Beckwith v. Golden Rule Co.* 108 Minn. 89, 121 N. W. 427. If there be an issue of fact, it must be determined by a trial and not on a motion to strike out the answer. Defendant's claim that plaintiff had rescinded the sale is not clearly shown to have been unfounded, and the answer should not have been stricken out as sham.

Judgment reversed.

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STANDARD GRAIN COMPANY v. MIDDLEWEST  
GRAIN COMPANY.<sup>1</sup>

June 6, 1919.

No. 21,203.

**Account stated — evidence.**

1. The testimony considered and found sufficient to justify the finding that there was an account stated between the plaintiff and defendant and for judgment as ordered.

**Trial — rulings on admissibility of evidence.**

2. The assignments of error as to the rulings of the trial court upon the admissibility of evidence examined and no reversible error found.

Action in the district court for Hennepin county to recover \$24,922.08 upon an account stated. The case was tried before Molyneaux, J., who made findings as stated in the third paragraph of the opinion and ordered judgment in favor of plaintiff for the amount demanded. From an order denying its motion for a new trial, defendant appealed. Affirmed.

<sup>1</sup>Reported in 172 N. W. 775.

*H. V. Mercer & Company*, for appellant.

*Hugh J. McClearn*, for respondent.

QUINN, J.

This is an action upon an account stated. It was tried to the court without a jury. Findings were made and judgment ordered as demanded in the complaint. From an order denying its motion for a new trial, defendant appealed.

Plaintiff is a corporation and during the times in question was a member of the Minneapolis Chamber of Commerce and engaged in the grain business. The Abbey Grain Company was organized in 1914. It was a member of the Minneapolis Chamber of Commerce until December 29, 1915, when it was expelled. Jourgen Olson, during that time, had been its president, and F. H. Schmitt its vice president and bookkeeper. After the expulsion, the Middlewest Grain Company was organized, for the purpose of carrying on the business formerly conducted by the Abbey Company. The old accounts were transferred to the ledger of the new company and were carried forward in its accounts. The old company had transacted a large amount of business with the plaintiff under arrangements made by Mr. Olson. The new company transacted a large volume of business with the plaintiff in the same manner as did the old company, the plaintiff advancing to it a considerable amount of money from time to time. It was the custom of the plaintiff and defendant to have their bookkeepers check and compare their respective accounts each month. On July 31, 1916, the accounts were again checked and they balanced. On August 1, 1916, plaintiff addressed a letter to the defendant, stating therein the balance claimed to be due it from the defendant as shown by the books, and asked it to confirm the account if found correct. Thereupon Mr. Schmitt, the manager and treasurer of the defendant company, and Mr. Higgins, its bookkeeper, examined the books of defendant, and after so doing signed and confirmed the account as stated in such letter. Thereafter defendant refused to pay the same and this action was brought. Defendant's answer was a general denial and alleged conspiracy and fraud.

The trial court found as matters of fact, that the plaintiff and defendant were engaged in the grain business during the years 1915 and 1916;

that during that time the plaintiff, at the request of defendant, transacted certain business and advanced certain sums of money for and on behalf of defendant; that from December, 1915, F. H. Schmitt was the manager and in full control of defendant's affairs and business; that on August 1, 1916, an account was stated between the plaintiff and defendant, from which it was found and determined that there was due and owing from the defendant to the plaintiff a balance of \$24,922.08; that there was no fraud or conspiracy between F. H. Schmitt and the plaintiff company, or any of its officers, agents, servants or employees as alleged in the answer; that there was no fraud on the part of the plaintiff or any of its officers or agents in any of its dealings with the defendant, and that neither the plaintiff nor any of its agents or officers had any notice or knowledge of any irregularities, if any there were, in the accounts of O. M. Woodward, or in any of the accounts kept by the defendant company, and that none of F. H. Schmitt's personal transactions entered into the account stated between the plaintiff and defendant on August 1, 1916, and ordered judgment in favor of the plaintiff and against the defendant in the sum of \$24,922.08, with interest.

There are many assignments of error and the record is voluminous. We have examined the same with care, and are satisfied that the findings of the trial court are amply sustained by the evidence. We find no reversible error in the rulings of the court upon the admissibility of evidence. Under this view of the case we deem it unnecessary to attempt a review of the many assignments of error based upon the rulings of the court during the trial. The order appealed from is affirmed.

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**FARMERS HANDY WAGON COMPANY v. PETER ASKEGAARD.<sup>1</sup>**

June 6, 1919.

No. 21,232.

**Evidence — testimony of oral agreement admissible.**

1. Testimony of an oral agreement was properly received over the objection that the agreement was merged in the contract evidenced by subsequent correspondence between the parties, for the correspondence

<sup>1</sup>Reported in 172 N. W. 881.

did not purport to be a contract, and contained merely admissions as to the terms of the oral agreement.

**Verdict sustained by evidence.**

2. Under the issues and the law as submitted to the jury, and to which no exception was or is taken, the verdict finds sufficient support in the evidence.

Action in the district court for Clay county to recover \$257.50 for merchandise sold and delivered. The facts are given in the first paragraph of the opinion. The case was tried before Nye, J., and a jury which returned a verdict for \$32.64 in favor of defendant. From an order, Parsons, J., denying its motion to set aside the verdict and for a new trial, plaintiff appealed. Affirmed.

*Edgar E. Sharp*, for appellant.

*Christian G. Dosland*, for respondent.

**HOLT, J.**

Plaintiff sued to recover \$257.50 for silo material sold and delivered to defendant in the fall of 1912. The defense was that the purchase was made upon the condition that plaintiff was to pay half the freight upon the material, and that plaintiff was to provide the services of a man to erect the silo, for which defendant was to pay at the rate of three dollars per day and board and lodging, and that plaintiff had failed to perform its agreement in that respect, and hence the action was prematurely brought. The reply was a general denial. The jury returned a verdict for defendant for \$32.64, pursuant to a stipulation that if they did not find for plaintiff they should award defendant the full amount of the freight paid by him. Plaintiff appeals.

We think no errors occurred in the rulings during the trial. Defendant maintained that, as a part of and as an inducement to enter the written order or contract to purchase the material, there was an oral agreement made that plaintiff was to furnish a man to erect the silo. Plaintiff's counsel objected to testimony establishing this oral agreement on the ground that it tended to vary the terms of the written instrument, and stating: "Plaintiff doesn't question the fact that an agreement was made, but our point is that the agreement as actually presented to the

company is expressed in the correspondence here and is controlling." In other words, it was claimed that the oral agreement merged in the correspondence, so that no testimony of its terms as orally expressed was competent. The letters simply contain admissions as to the provisions of the oral contract and do not purport to be the contract itself. The real contract existed as made, the same as if the letters had not passed between the parties, and, of course, its terms could be testified to, unless the fact that there was a written order for the purchase of the silo material prevented its admission. We think it did not, for the one agreement relates to the purchase of the material for a silo, and the other to the construction thereof. But, aside from that, there is really no variance between the correspondence and the oral contract testified to by defendant.

No error is assigned upon the charge to the jury, and the only other matter open to appellant is the claim that the verdict is not supported by the evidence and is contrary to law.

Had the evidence stopped with the refusal of the man, sent out by plaintiff to erect the silo, to go ahead with the work, no one could have questioned the sufficiency of the support. The man sent out did not propose to do any of the work, but merely to superintend. That he misunderstood the terms of the contract or plaintiff's instructions appears from the subsequent correspondence. In that situation plaintiff could not sue until it sent a man to erect the silo, or until it had made an offer so to do which had been rejected, or until it was made to appear that an offer would be futile. No person was sent to defendant by plaintiff after the return of the one who refused to do any part of the work. The subsequent letters between the parties show a disposition to be fair; plaintiff recognizing that it was its obligation to furnish a man competent to direct and assist in the erection of the silo including the foundation for the same. Defendant admitted his duty to pay when this was done, for he promised to pay at once if plaintiff would guarantee to send the man when he called for him. And, when plaintiff asserted that its business reputation was sufficient without a guaranty, defendant accepted even that and sent a check for the full purchase price. This was returned immediately by plaintiff, upon the erroneous supposition that defendant had no right to deduct one-half the freight he had paid. This was early in December. At that time of the year a cement foundation



could not be constructed except at extraordinary cost. Defendant did not then ask to have a man sent up, and there appears no answer to the letter returning the check. Plaintiff made no further effort to offer to furnish a competent person to erect the silo, but left the matter in the hands of the attorneys who in April following issued summons and complaint which were served.

These facts justify a finding that plaintiff failed to carry out its agreement, and had made no proper offer to carry it out so as to place defendant in default before suit. That finding was decisive of the lawsuit, for this instruction to the jury was not challenged by the motion for new trial, nor is it here, viz.:

"If the plaintiff here has furnished that silo and has done as it agreed to do, or if it offered to perform as it agreed to perform its part of the contract, then the defendant would be obliged to receive this silo and pay for it at the price claimed. If, on the other hand, the plaintiff failed or refused to carry out its part of the agreement, either in the matter of sending a man there to construct that silo, or in the man's failure to perform what he should have performed there under the contract, and thereby defendant refused to accept the silo because of the nonperformance of the plaintiff of its part of the agreement, then the defendant would not be required under this action to pay for the silo."

That defendant, after a dispute had arisen, was willing to pay and accept plaintiff's promise to fulfil its agreement in the future, should not conclude defendant, there being no evidence that the parties ever came to an understanding as to when the silo should be erected. Defendant contemplated its erection in the fall of 1912, at a time when the work could be done advantageously and he could store that season's fodder crop in it. Plaintiff proposes that it be done in midwinter, when clearly it would be more difficult and expensive. Before terms were agreed on, and, so far as this record goes, before any definite offer was made to erect the silo as agreed, suit was brought. The written contract reserved title to the silo material in plaintiff until full payment of the purchase price, and, under the instruction of the court above set out and accepted by the parties as correct, defendant was not in default of payment until plaintiff performed in respect to the construction of the silo. Under the accepted

law of the case, we think the verdict is sustained by the evidence.

Order affirmed.

HALLAM, J. (dissenting).

I dissent: The final understanding of the parties is embodied in the final correspondence. On November 30, 1912, in response to a letter inclosing statement of account defendant wrote plaintiff asking plaintiff to send a "guarantee" that the silo parts shipped were complete and also that "you will send a man to put up the silo if I should call for one." On December 2 plaintiff wrote declining to give any "guarantee" that the silo parts were complete, but said "when you are ready for a man, let us know and we will furnish one just as agreed upon." In answer to this, defendant sent his check for the amount due as shown by plaintiff's statement rendered, and thereby gave assent to the terms of plaintiff's letter. The check was returned for a correction, which plaintiff erroneously supposed was proper to be made. Both parties at this time considered payment due, and it was. The contract provided for payment on receipt of the material. The furnishing of a man to put up the silo was a condition subsequent to be performed by plaintiff only in the event defendant "should call for one." Defendant never called for one. He was obliged to do so if at all within a reasonable time. This action was not commenced until August 23, 1913. This surely allowed a reasonable time. I am unable to see wherein plaintiff failed in performance of its agreement and in my opinion plaintiff should recover.

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W. P. LEE AND OTHERS v. ARTHUR T. SCRIVER.<sup>1</sup>

June 6, 1919.

No. 21,237.

**Municipal ordinance — sewer connection — action for contribution.**

Certain property owners in the city of Northfield constructed a sewer in the street in front of their property at their own expense under an ordinance which authorized them to do so, and which provided that any

<sup>1</sup>Reported in 172 N. W. 802.

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person desiring to connect with the sewer should be permitted to make such connection on paying his proportionate part of the cost thereof. Defendant connected his property with an extension of the sewer constructed by other parties. The parties who had defrayed the expense of constructing the original sewer brought suit to collect from defendant his proportionate part of the cost thereof.

*Held:* That all the plaintiffs except two had legal capacity to sue; that these two could be stricken from the complaint or disregarded; that any defect of parties had been waived; that the ordinance is not void as delegating nondelegable powers to the grantees therein; that defendant is not absolved from the obligation to pay his proportionate part of the cost of the sewer by the fact that he connected with it through an extension constructed by other parties, and that defendant's claim that the amounts expended by plaintiffs have already been repaid to them is without support in the evidence.

Action in the district court for Rice county to recover \$41.64 for failure to pay for sewer connection with defendant's lot. The answer alleged that the ordinance mentioned in the complaint and opinion was illegal, unconstitutional and void; that its provisions were beyond the powers of the common council of the city of Northfield, granted to it by the city charter; that it was contrary to the provisions of the Constitution of the state of Minnesota; that its provisions were an attempt to take private property without due process of law. The case was tried before Childress, J., who denied defendant's motion to dismiss on the ground that plaintiffs had no legal capacity to sue and on the further ground that the complaint did not state facts sufficient to constitute a cause of action, made findings and ordered judgment in favor of plaintiffs for \$40.53. From an order denying his motion for a new trial, defendant appealed.

Affirmed.

*William W. Pye* and *Raymond Ziesmer*, for appellants.

*C. P. Carpenter*, for respondents.

TAYLOR, C.

In 1895 the city of Northfield adopted an ordinance authorizing F. J. Wilcox and some 20 other persons named therein, their representatives or assigns, to construct and maintain a sewer along a designated portion of Second street in that city with a branch extending from Second street

to Fourth street, and providing that any person desiring to connect with such sewer should be permitted to do so on paying to said grantees his proportionate part of the cost thereof, with interest at the rate of 6 per cent from the time of the completion of the sewer to the time of so connecting therewith. The grantees were residents along the line of the proposed sewer. They formed an organization designated as "Second Street Sewer Association," elected officers consisting of a president, secretary and treasurer, and, although unincorporated, conducted their business in the manner of a corporation through these officers. They constructed the sewer in 1896 at a cost of \$1,234.54 and connected their own dwellings with it. Thereafter, from time to time, others connected their dwellings with this sewer, and on making such connections each one paid his proportionate part of the cost and thenceforth was accepted and considered as a member of the association and as entitled to a pro rata share of subsequent payments. Certain property owners, at their own expense, constructed an extension to the sewer three blocks in length. Thereafter, and in 1816, defendant connected his house with this extension. He refused to pay for connecting with or using the original sewer and this suit followed. The court made findings of fact and conclusions of law and directed judgment against him for the sum of \$40.53 with interest from the date he connected with the sewer. He appealed from an order denying a new trial.

Defendant states the questions presented as follows: "First: Assuming the validity of the ordinance, is defendant subject to its provisions? Second: Is the ordinance valid and constitutional? Third: Has plaintiff legal capacity to sue?

Defendant's contention that plaintiff has no legal capacity to sue is predicated on the erroneous assumption that the Second Street Sewer Association, an unincorporated body, is the plaintiff. Fifty-four persons, Carleton College, Estate of William Watson and Estate of Robert Watson, are named in the complaint as plaintiffs. The fifty-four individuals and Carleton College clearly had legal capacity to sue, *Holden v. Great Western Elev. Co.* 69 Minn. 527, 72 N. W. 805, 65 Am. St. 585, and can maintain the action even if it be conceded that the two estates are not legal entities and cannot be recognized as plaintiffs. The two estates may be stricken out or the words designating them be disregarded as

surplusage. If the decedents had an interest in the cause of action and their successors in interest have not been made parties, this at most would only amount to a defect of parties, and such defect has been waived by failing to point it out and designate the necessary parties who have been omitted. 2 Dunnell, Minn. Dig. § 7551.

In support of his claim that the ordinance is unconstitutional and void, defendant seems to contend that the city could not authorize property owners to construct a private sewer in the streets. It was not a private sewer except in a restricted sense, for the ordinance provides that when constructed any person who so desires shall be permitted to connect with it on paying his proportionate share of the cost. The city had control of the streets, and, while it could not divest itself of the power to exercise such control in the future, it could give private parties the privilege of furnishing a service necessary for the convenience and welfare of the citizens of that locality. Street-car lines, telephone lines, water mains and similar facilities, owned by private parties, are found in the streets of nearly all cities, and the power of the city to authorize the use of its streets for such purposes is too well settled to require the citation of authorities. Defendant further contends that the ordinance gives the grantees named therein the power to levy and collect assessments for the sewer, and is void for that reason. The ordinance does not purport to confer any such power. It merely provides that any person desiring to connect with the sewer may do so on paying his proportionate share of the cost. No one is under any obligation to pay, unless he uses the sewer and he may use it or not as he elects. Defendant's contention that no part of the cost of the sewer can be collected from him, because he did not connect with it directly, but with an extension of it constructed by other parties, is answered by the cases of *City of Fergus Falls v. Boen*, 78 Minn. 186, 80 N. W. 961; and *City of Fergus Falls v. Edison*, 94 Minn. 121, 102 N. W. 218, 70 L.R.A. 238.

Defendant's further contention that plaintiffs are not entitled to recover because they have already collected the full cost of the sewer from others who have connected with it since it was constructed, is not sustained by the facts. The amount which a property owner was required to pay for the privilege of connecting with the sewer seems to have been determined by dividing the cost of the sewer by the number of buildings

which would be served by it after such connection was made. These payments, over and above the amounts expended for repairs and improvements, were distributed pro rata among all who were then members of the association. While the aggregate amount of these payments exceeds the original cost of the sewer, the practical result of the manner in which they were applied is that the original cost has been distributed pro rata among about 60 members instead of being borne wholly by the original grantees named in the ordinance. The amount sought to be collected from defendant appears to be no greater than the share of the original expense still borne by all other members of the association. We are unable to sustain any of defendant's contentions and the order is affirmed.

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GEORGE C. STILES v. AMERICAN SURETY COMPANY OF NEW YORK.<sup>1</sup>

June 6, 1919.

No. 21,256.

**Supersedeas bond construed — principal and surety.**

A bond filed by defendant in proceedings by writ of error in review by the Supreme Court of the United States of a judgment of this court affirming a judgment of the district court, *held* to obligate defendant and his surety to pay the judgment so affirmed by this court, upon an affirmance of its judgment by the Federal Supreme Court.

Action in the district court for Hennepin county to recover \$2,500 upon the bond of defendant surety company. The defense is stated in the fourth paragraph of the opinion. Plaintiff's motion for judgment on the pleadings was granted by Rockwood, J. From the judgment entered pursuant to the order for judgment, defendant appealed. **Affirmed.**

*Stringer & Seymour*, for appellant.

*F. M. Miner*, for respondent.

BROWN, C. J.

In August, 1917, plaintiff duly recovered a judgment in the district

<sup>1</sup>Reported in 172 N. W. 776.

court of Hennepin county against Jacob M. Dickinson, as receiver of the Chicago, Rock Island & Pacific Railway Company, for the sum of \$2,356.75. Defendant therein duly appealed from the judgment to this court, where it was in all things affirmed with costs. Defendant then sued out a writ of error for the review of the judgment of this court by the Supreme Court of the United States, and by the order allowing the writ was required to execute and file a bond as required by law in the sum of \$2,500, the bond when approved to act as a supersedeas. In compliance with the order a bond in due form was executed and filed in the office of the clerk of this court, conditioned as follows:

"Now, therefore, the condition of this obligation is such that if the above named Jacob M. Dickinson, as receiver of the Chicago, Rock Island & Pacific Railway Company, shall prosecute his said writ of error to effect and answer all costs and damages which may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect."

The cause then proceeded to the Supreme Court of the United States, where in due course of procedure the judgment of this court so under review was in all things affirmed.

The receiver on the remand of the cause refused to pay the judgment of the Hennepin court, so appealed to and affirmed by this court, and later by the Supreme Court of the United States, and plaintiff brought this action to recover on the bond so executed and filed on the issuance of the writ of error. Defendant, the surety in such bond, interposed in defense that the payment of the judgment of the Hennepin court was not within the conditions of the bond; that the judgment for costs, \$25, entered in this court in connection with the affirmance of the judgment of the Hennepin court, was the only judgment the defendant was obligated by the bond to pay, therefore that plaintiff could not recover. The trial court rejected this defense and ordered judgment in plaintiff's favor for the full amount of the judgment of the Hennepin court, and defendant appealed.

The conclusion of the trial court was right and must be affirmed. The appeal to this court from the district court, removed the action, judgment and all, to this court for review. The judgment was affirmed by a formal judgment of this court. The provision thereof that plaintiff have and

recover the sum of \$25 costs, was but an incident of the final action of this court, and was not the essence of the decree. The writ of error was in review of the judgment affirming the Hennepin county judgment, and not the part thereof which awarded the costs of the appeal to plaintiff. The bond therefore necessarily obligated defendant to pay the principal judgment, not merely the costs. It was supersedeas in form and prevented proceedings on the judgment below. *Erickson v. Elder*, 34 Minn. 370, 25 N. W. 804; *American Surety Co. v. Northern Packing & Prov. Co.* 178 Fed. 810, 102 C. C. A. 258; *Rosenstein v. Tarr*, 51 Fed. 368.

Judgment affirmed.

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STATE V. FRED DEIKE.<sup>1</sup>

June 6, 1919.

No. 21,260.

**Army and navy — discouraging enlistment — verdict not sustained by evidence.**

The evidence is held insufficient to show a violation of chapter 463, Laws 1917, known as the Sedition Act.

Defendant was indicted by the grand jury of Redwood county for the crime of discouraging enlistment in the military and naval forces of the United States, tried in the district court for that county before Olsen, J., and a jury which found him guilty as charged in the indictment. From an order denying his motion to set aside the verdict and for a new trial, defendant appealed. Reversed.

*John A. Dalzell*, for appellant.

*Clifford L. Hilton*, Attorney General, *James E. Markham*, Assistant Attorney General, and *Albert H. Enerson*, County Attorney, for respondent.

HOLT, J.

Defendant was convicted under an indictment charging him with

<sup>1</sup>Reported in 172 N. W. 777.



having unlawfully advocated that citizens of the state should not aid or assist the United States in prosecuting and carrying on the war with Germany by speaking these words in the presence of two citizens, viz.: "The soldiers at Camp Grant (referring to one of the camps at which the United States' enlisted and selected men are now and then and prior thereto were being trained for military service) do not have anything fit to eat; they do not have any white bread, but all black bread that isn't fit for a dog to eat; that they have beans that are hard and soured; that all other American camps are the same way; I have visited three different camps this summer; that the boys in the camps are not allowed to write the truth about the matter, they are guarded; the reports we get in the American papers as to the war are not true; that I have a paper printed in Wisconsin that has the news right from the front over a wireless that the United States cannot understand; that every time 10,000 German soldiers are killed 30,000 American soldiers are killed; that the German Lutherans have control of the wireless reports."

Defendant challenged the sufficiency of the indictment by demurrer and by objection to the reception of evidence thereunder. Errors are now assigned upon the rulings sustaining the indictment and also to certain portions of the charge.

No consideration needs be given either the indictment or the court's instructions to the jury, for we have come to the conclusion that the evidence fails to show a violation of chapter 463, p. 764, Laws 1917.

That defendant spoke the words substantially as set out in the indictment must be held established by the verdict. But, taking the language at its full face value, it cannot be held that thereby is taught or advocated what is forbidden by the law mentioned. At most, it may be said that the language set out might come under the ban of the law, depending upon the circumstances under which it was used. It is not to be forgotten that this is a penal statute, and that the innocence of the accused is to be presumed, unless the words, standing alone or when considered in connection with the occasion of their use, show guilt beyond a reasonable doubt. Do the circumstances under which defendant uttered the words attributed to him warrant an inference that he taught or advocated that men should not enlist in the army or navy of the United States, or that citizens should not aid in war activities, or could his

hearers fairly so understand? The teaching and advocacy need not be direct and outspoken. Often the most perniciously effective teaching or propaganda may be carried on in veiled, insinuating, or ambiguous language, with the true meaning and sting conveyed by an artful inflection of the voice. It therefore becomes necessary to have regard for the setting under which the alleged seditious words were spoken.

Defendant's auditors were two farmers who drove up to his farm in an automobile on a Sunday morning in July, 1918. He was not acquainted with the men. They said that they came because a child of one of them, acquainted with a child of defendant who had been reported injured in an automobile accident, desired to ascertain the extent of the injury. Defendant and his wife had just returned from a trip to Illinois. On the trip they had visited Camp Grant, where defendant had a nephew in the army. At the time of their visit to the camp an entertainment or picnic was given the soldiers by the surrounding communities, and eatables were brought in by automobiles and trucks. Defendant's explanation of the remarks about the food served in the army camps was that one of the soldiers, in appreciation of the entertainment, made a speech, saying that what was provided for them was something different from the soured beans and black bread of their usual rations. However, we take it the jury accepted the version of the state's witnesses. But, even so, there is an utter lack of circumstances indicative of teaching or advocating any matter prohibited by the law under which the indictment was framed. Both of the state's witnesses admit that not a word was uttered by anyone upon the subject of enlistment, or the selective draft law, or the bond or thrift stamp drives, or the Red Cross work or any other war activity. Nor was there any discussion or questioning of the justice of our cause in the war, nor an intimation that a single effort for speedy victory should be relaxed. On this Sunday morning one of the visitors had a brother in an army camp, defendant had a son about to be sent overseas (another son was in the service at the time of the trial), and he and his wife had 17 or 18 nephews in different training camps and at the front. Defendant, a farmer, uttered not a whimper for having lost his best help in the approaching harvest. He stated to the men that he would try to get along as best he could. There is not a whisper that defendant had been disloyal in word or deed unless the words spoken on

this occasion are to be so construed. Indeed, his offer to prove his loyalty was objected to by the state and sustained. As a matter of fact, the three men indulged in the customary desultory talk that takes place at a casual meeting of a few minutes' duration.

We all know that during the continuance of this war it furnished topics for conversation wherever two or more people met. Nearly every family had one or more sons or relatives in the ranks, with more awaiting call. The food, discipline, treatment and welfare of these boys were uppermost in their hearts. Of prime interest was also the probable duration of the war, and its destruction of life and property. Information on these and kindred war matters was eagerly sought and listened to. That much of the talk would be speculation and mere wild gossip goes without saying. This applies also to newspaper reports and discussions. Some of these were no doubt as wild and fanciful as the German wireless messages heard by defendant in Chicago. But the legislature never intended by this law to deprive the citizens of the right to talk about, discuss, speculate upon, or to even criticize matters pertaining to the war. The act plainly limits the restrictions upon free speech to teaching or advocating that men should not enlist as soldiers or sailors, and that citizens should not aid in the activities commended by the government for carrying on the war. There is nothing in what defendant said, or the connection in which it was said, that can be tortured into an attempt to sway or affect the thought or conduct of his auditors on any subject, and certainly not as against enlistment or for withholding aid in the prosecution of the war. There was no gloating by defendant over the rumor or report that our losses in battle had been three times as great as that of our enemies. For aught that appears defendant was for a more vigorous prosecution of the war because of our supposed losses. Defendant may have embellished the gossip he was retailing, but the law is not directed against prevaricators.

Scarcely any conviction subjects the offender to such a severe and lasting public scorn and disgrace as falls upon the one found guilty of disloyalty to his country during the stress of war. And justly so. The consequences being so severe to one accused of an offense denounced by a statute as of a seditious or disloyal nature, he should not be convicted,

unless the evidence fairly shows the statute to have been violated. We think the evidence fails to so show in the instant case.

The order is reversed and a new trial granted.

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STATE EX REL. WALTER GILBERT v. W. S. CARVER.<sup>1</sup>

June 6, 1919.

No. 21,456.

**Habeas corpus — justice of the peace — failure to impanel a jury.**

Where, as in this state, a trial by jury in a prosecution for a misdemeanor, may be waived, a failure on the part of the justice to impanel a jury upon a plea of not guilty being entered, is a mere error not affecting the jurisdiction, and does not entitle the prisoner to be discharged on habeas corpus.

Relator was tried in justice court of the city of Fairmont, charged with the crime of drunkenness, found guilty as charged and committed to the county jail for 60 days. After 30 days he petitioned the district court for Martin county for a writ of habeas corpus directed to W. S. Carver, sheriff, and the writ was granted by the court commissioner. On the return day the petition was denied and the prisoner remanded to custody of the sheriff. From the order denying the petition and remanding the prisoner, defendant appealed. Affirmed.

*Albert R. Allen*, for relator.

*Paul C. Cooper*, County Attorney, for respondent.

PER CURIAM.

The relator was arrested upon a warrant charging him with the crime of drunkenness, and on the following day was taken before the justice for arraignment. The charge as contained in the warrant was then read to him and he entered a plea of not guilty, and at the same time stated to the court that he was ready for trial and that he did not want a lawyer. The witnesses, both upon behalf of the prosecution and of the defendant,

<sup>1</sup>Reported in 172 N. W. 771.

were called, sworn and gave testimony. After considering the evidence the court found and adjudged the defendant to be guilty of the crime as charged and that he be committed to the common jail of the county for the term of 60 days, and issued a mittimus in due form in accordance therewith. The relator was then committed to the common jail of the county. On the sixth day of May appellant sued out a writ of habeas corpus to secure his discharge from custody, upon the ground that the commitment and his detention thereunder were illegal and void and that he was committed without his constitutional right to a trial by jury. The return of the respondent was that he detained the relator by virtue of the mittimus. After a hearing before the court commissioner upon the petition for the writ and respondent's return, the writ was discharged and the relator appealed.

It is not contended but that the justice had jurisdiction at the commencement of the action. The contention of the relator is that it was the duty of the justice to impanel a jury after the plea was entered, for the purpose of the trial of the accused, and that his failure so to do amounted to a denial to him of the right to trial by jury and that the court lost jurisdiction thereby. With this contention we are unable to agree. The failure on the part of a justice of the peace to impanel a jury to try a misdemeanor does not oust the court of jurisdiction, but at most renders the judgment erroneous, which question cannot be raised on habeas corpus. 1 Dunnell, Minn. Dig. § 4129.

It is well settled that, where trial by jury may be waived, the denial of a jury trial is a mere error not affecting the jurisdiction and does not entitle the prisoner to be discharged on habeas corpus. 21 Cyc. 305, § 12, and cases cited; State v. Woodling, 53 Minn. 142, 54 N. W. 1068. See also 21 Cyc. 298; State v. Riley, 109 Minn. 434, 124 N. W. 11; State v. Kinmore, 54 Minn. 135, 55 N. W. 830, 40 Am. St. 305. The order appealed from is affirmed.

GEORGE F. MUENKEL v. OTTO MUENKEL AND OTHERS.<sup>1</sup>

June 13, 1919.

No. 20,905.

**Verdict sustained by evidence.**

1. There is evidence to sustain a verdict against defendants for assault upon plaintiff's home and property in the night-time by the throwing of rocks accompanied by riotous language.

**Assault on house — evidence of fear admissible.**

2. It was proper to permit proof that the inmates of plaintiff's home were frightened. This evidence tended to characterize the violence of the acts done. It was also proper to prove that the effect on plaintiff's wife was such as to cause her partial incapacity to perform household duties.

**Witness — cross-examination.**

3. The court properly permitted cross-examination of an adverse witness by the party calling him.

**Appeal and error — question not reviewable.**

4. The propriety of sustaining an objection to a question asked a witness cannot be considered on appeal, if there is no showing as to what testimony the witness would give.

**Impeachment of witness — evidence of malice.**

5. It was proper to prove previous conviction of defendants who were witnesses for the purpose of impeachment, and if the conviction arose out of trouble with plaintiff proof of the trouble was admissible to show malice.

**Evidence inadmissible.**

6. A provoking remark by plaintiff, made before the first trouble, was properly rejected, there being no proof that it was communicated to defendants.

**Evidence admissible.**

7. Evidence that one of several defendants, jointly sued, counseled restraint of lawlessness at the time of an affray, is admissible as to him. It was not error to reject certain evidence offered for that purpose, since

<sup>1</sup>Reported in 173 N. W. 184.

it was not shown that the occasion was the same as the one complained of.

**Charge to jury.**

8. It was proper for the court to charge that the acts complained of were criminal offenses.

**Compensatory damages.**

9. Compensatory and exemplary damages are given, if at all, in a lump sum.

**Appeal and error — reversal.**

10. That the court gave the jury no opportunity to assess punitive damages against the defendants separately, is not ground for reversal.

**Damages not excessive.**

11. The damages are not excessive.

**Denial of new trial — motion by minor.**

12. One of six defendants was a minor, but was over 20 years old, at the trial. He was ably defended by the same attorney who defended the others. He admitted wrongdoing. After verdict he asked for appointment of a guardian ad litem and for a new trial on the ground of his infancy. The application was presented by the attorney who represented him on the other trial. No other attorney was suggested. No prejudice was shown. After he became of age the motion for a new trial was denied. *Held* no error.

Action in the district court for Houston county to recover \$5,000 for assault. The answers were general denials. The case was tried before Catherwood, J., and a jury which returned a verdict for \$1,200. From an order denying their motions for a new trial, defendants appealed Affirmed.

*Edward Lees* and *Lees & Bunge*, for appellants.

*W. A. Deters* and *William S. Hart*, for respondent.

**HALLAM, J.**

1. On April 23, 1915, there was a neighborhood "sociable" at a school-house in Winnebago Valley, Houston county. The defendants were all there. One of the defendants brought a keg of beer and located it in a pasture some distance down the road to the east of the school-house. Defendants went back and forth between the school-house and the pasture from time to time during the evening. Plaintiff's farm house is across the road and a little to the west of the school-house. Some

of his out-buildings, including a hog house, lie to the east of the school-house. Plaintiff and his father were at the hog house during the early part of the evening. There is evidence that, while they were there, rocks were thrown at the hog house, and one came through the roof. Several men were outside, two were seen to throw rocks, one of the defendants was recognized as one of them. Later in the evening, and towards midnight, plaintiff, his wife and baby, and his father and mother, were in plaintiff's house. Rocks were thrown at the house, first from the east side and later from the south side. One large pointed rock, as big as a man's fist, crashed through the front window and landed on the floor beside plaintiff's wife and baby. There was shouting in riotous and vulgar and profane language. After throwing rocks at the house the crowd chased plaintiff's cattle, threw rocks at some of his out-buildings and indulged in other acts of lawlessness. There is evidence that all of the defendants were in the crowd and that they all participated in the acts of lawlessness, though not all of them were seen to actually throw rocks. Plaintiff and his family were much frightened. All sat up all night except plaintiff's wife. She lay down with her baby without undressing. The jury found for plaintiff and gave damages in the sum of \$1,200. From an order denying a new trial, defendants appeal.

The evidence is undoubtedly sufficient to sustain a verdict for plaintiff in some amount. Defendants assign numerous errors in law in the conduct of the trial.

2. The court admitted proof that the members of plaintiff's family were frightened. This was not error. No damages were claimed for their fright. The testimony had some tendency to characterize the violence of the acts done and was proper. Evidence that the acts of defendants caused nervous shock to plaintiff's wife, which resulted in her incapacity to perform her usual household duties as before, was proper, and this element of damages was proper to be considered.

3. The court permitted plaintiff's counsel to cross-examine plaintiff's witness, Selmar Johnson. The witness was plainly an unwilling one and it was within the discretion of the court to permit cross-examination. *Selover v. Bryant*, 54 Minn. 434, 56 N. W. 58, 21 L. R. A. 418, 40 Am. St. 349. It was likewise proper to ask the witness whether defendant Sheehan told him to say "I don't know" to everything that



was asked him while on the stand. The answer was "yes" and was properly received.

4. Defendant Sheehan denies telling Johnson this, and, after stating that he did have a conversation with Johnson, was asked to state what the conversation was. Defendants complain of the exclusion of his answer. As to this it is only necessary to say that there was no offer of proof and therefore no showing that the answer would have been material or proper evidence. *Conlan v. Grace*, 36 Minn. 276, 30 N. W. 880; *Nichols & Shepard Co. v. Wiedemann*, 72 Minn. 344, 75 N. W. 208, 73 N. W. 41.

5. Plaintiff was permitted to prove, that at a previous "sociable" trouble had occurred between plaintiff and some of the defendants, and that three of defendants were arrested and pleaded guilty and were put under bonds to keep the peace. This testimony was proper. Evidence of previous conviction of a person called as a witness is always proper as impeachment. These defendants were witnesses. Evidence of the nature of the crime was properly received. *Thompson v. Bankers Mut. Casualty Ins. Co.* 128 Minn. 474, 151 N. W. 180, Ann. Cas. 1916 A, 277. Evidence of the former trouble was also admissible as tending to show malice. Such testimony should not be permitted in too much detail. The trial court must use discretion in these particulars. Discretion was not abused in this case.

6. Defendants then offered to prove a provoking remark made by plaintiff to the mother of one of the defendants as inciting the former trouble. This evidence was rejected. There was no evidence or offer of evidence to show that the remark was ever communicated to defendants. The evidence was therefore properly rejected.

7. Defendants' counsel offered to prove that defendant Otto Muenkel saw Sheehan throw a rock, and said to him: "Don't do that, quit that, you might hurt somebody." This evidence was rejected. If this occurred on the occasion of the rock throwing on which this action is based, no doubt it was admissible as to him. It would then have a tendency to show that this defendant was restraining the lawlessness instead of participating in it. But the witness made it reasonably clear that it did not occur on that occasion. He said that at the time it happened he saw no one except Sheehan present. He did not fix the time,

but from all his testimony we may infer it was the early part of the evening. He did not locate the place, but did not suggest that the rock was thrown at or towards plaintiff's house. In fact he denied having seen plaintiff's house and denied knowing where it is. From all his testimony it must be inferred that this incident occurred many rods from plaintiff's house, and not at the time of the bombardment of which the plaintiff complains. It had therefore little materiality and its rejection was not reversible error.

8. Exception is taken to the charge of the court that the acts of which the defendants were charged constituted several criminal offenses. The acts, if committed, did constitute the criminal offenses mentioned and we see no impropriety in the court so stating. The rules as to exemplary damages apply to wrongful acts punishable as crimes. *Boetcher v. Staples*, 27 Minn. 308, 7 N. W. 263, 38 Am. Rep. 295; 17 C. J. 981. The fact that the act committed is a crime as well as a tort is not conclusive of the right to exemplary damages. *Ward v. Blackwood*, 41 Ark. 295, 48 Am. Rep. 41; *Brown v. Allen*, 35 Iowa, 306. But the relation of malice to crime is so close that we think criminality is proper to be considered in determining whether the elements necessary to exemplary damages are present. See *Anderson v. International Harvester Co.* 104 Minn. 49, 116 N. W. 101, 16 L.R.A.(N.S.) 440; *Wills v. Noyes*, 12 Pick. 324.

9. The court charged: "No sum should \* \* \* be awarded \* \* \* as exemplary damages, unless you find generally in favor of the plaintiff, \* \* \* and your verdict should be in its form a verdict in a single lump sum as the plaintiff's total damages." By this the court meant that compensatory and exemplary damages were to be assessed, if at all, not separately, but in a lump sum. This was proper.

10. Defendants complain that this gave the jury no opportunity to assess punitive damages against the several defendants separately. If the charge can be so construed this was not ground for reversal. This court held in *Warren v. Westrup*, 44 Minn. 237, 46 N. W. 347, 20 Am. St. 578, that joint wrongdoers are each liable for all the damages following the wrongful act and that the jury "should estimate the damages against all guilty defendants according to the amount which they think the most culpable must pay." It does not appear from the record of

that case whether exemplary damages were involved. Some jurisdictions apply this same rule to exemplary as well as compensatory damages. 17 C. J. 989. In *Nelson v. Halvorson*, 117 Minn. 255, 135 N. W. 818, Ann. Cas. 1913D, 104, an action for false imprisonment against the party instituting the proceeding and the constable who served void process, where the wrong was said to be not "the same in kind or motive," it was held there should be separate submission of the question of exemplary damages. In this case the defendants are liable, if at all, as joint participants in the riotous acts charged. Whether there should ever be separate submission of the question of exemplary damages in any such case, we are not called upon to decide. Neither separately nor together did these defendants request separate verdicts as to either compensatory or exemplary damages. They did not at the trial except to the charge on the ground that it did not so submit the case. Nor do we think the evidence in this case was such as to warrant a finding of different degrees of culpability among defendants who, under the instruction of the court, were found liable at all. We think the verdict should not now be set aside because the trial court failed to submit separate verdicts as against the several defendants.

11. It is earnestly contended that the damages are excessive. We have considered this feature of the case very carefully. The verdict is large. The physical damage was small, but if the testimony on behalf of plaintiff is true there were circumstances in aggravation that would sustain a substantial verdict. We do not feel warranted in disturbing the amount of the verdict.

12. The defendant Mittendorf was 20 years and 4 months of age at the time of the trial. No guardian ad litem had been appointed. He was ably represented at the trial by the same attorney who represented the other defendants. He testified that he was "one of the rock throwers" and threw a rock himself, though he denies the incident as testified to by plaintiff's witnesses. After the verdict was rendered he made application for the appointment of a guardian ad litem and at the same time moved for a new trial on the ground that he was not of age. The hearing on his application and motion was continued until after he became of age. The same attorney appeared in these proceedings as on the trial. There has been no suggestion of the employment of any other

or that the same or any other attorney could present his defense any better than it was presented. There was no actual prejudice. The court had jurisdiction over him. The proceeding was not void. *Eisenmenger v. Murphy*, 42 Minn. 84, 43 N. W. 784, 18 Am. St. 493. If he had been still a minor when the court finally disposed of the case the situation might be different. It has often been held that if the court appoints a guardian ad litem during the trial it may properly proceed. *Patterson v. Melchior*, 106 Minn. 437, 119 N. W. 402; *Webster v. Page*, 54 Iowa, 461, 6 N. W. 716; *Wickersham v. Timmons*, 49 Iowa, 267; *Sabine v. Fisher*, 37 Wis. 376; *Galbraith v. Pennington*, 184 Mo. App. 618, 170 S. W. 668.

In view of the fact that want of prejudice is almost conclusively shown we hold that the verdict should not be set aside on this ground Order affirmed.

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GUSTINE RUX v. WILHELMINA ADAM.<sup>1</sup>

June 13, 1919.

No. 21,147.

**Homestead — deed void.**

1. Eighty acres of land and the dwelling house thereon, owned by a married man who had left his wife and children, and which were occupied by him with a woman unlawfully living with him as his wife, constituted his homestead as defined by G. S. 1913, § 6957. His deed, not signed by his lawful wife, was void as to such homestead.

**Same — descent at death of owner.**

2. Upon his death, intestate, such homestead descended to his lawful wife and children and their rights therein vested on the day he died, without any acts on their part or on the part of the probate court.

**Same — probate court without jurisdiction to determine ownership.**

3. His widow had the right to invoke the aid of the probate court in determining the boundaries of his homestead, it being part of a tract of 120 acres, but that court had no jurisdiction to determine claims to the land which might be made by defendant under a deed of the entire tract from decedent. Defendant's rights under such a deed were

<sup>1</sup>Reported in 173 N. W. 912.

adverse to those of plaintiff as decedent's widow and did not rest upon a will or the laws of descent. The final decree of the probate court, determining that the land which is the subject matter of this action constituted decedent's statutory homestead at the time of his death, does not preclude defendant from litigating in this action the question of whether it was in fact his homestead.

**Adverse possession — evidence insufficient.**

4. The evidence falls short of establishing defendant's claim of title to the land in controversy by adverse possession.

**Occupying claimant not entitled to compensation.**

5. It justified a finding that the occupant thereof was not entitled to compensation by virtue of G. S. 1913, § 8070, for improvements made thereon.

**Same — want of actual notice — consideration.**

6. Under the occupying claimant's statute, one claiming compensation for improvements made on the land of another must prove, among other things, want of actual notice of the claim upon which the action to recover possession is founded previous to the time of making the improvements, and the payment of a valuable consideration for the land. The evidence did not require a finding that the former requisite existed. As to the latter requisite, a recital of a consideration in the deed to the occupant is not proof of the payment thereof as against a third person.

Action in the district court for Marshall county to recover possession of certain premises, \$500 damages for detention thereof and \$700 for rents and profits. The answer alleged that for more than 15 years defendant had been in actual, open and continuous possession of the premises under claim of right to the ownership thereof, and while in such possession procured from John Rux, who held the legal title to the premises, a warranty deed of the same which was set out at length. The case was tried before Grindeland, J., who made findings and ordered judgment in favor of plaintiff for the immediate possession of the premises. Defendant's motion for amended findings and conclusions of law was denied. From an order denying her motion for a new trial, defendant appealed. Reversed.

*A. N. Eckstrom*, for appellant.

*Julius J. Olson and Rasmus Hage*, for respondent.

LEES, C.

This is a contest between the widow of John Rux, deceased, and another woman with whom he lived during the last 20 years of his life. It involves 80 acres of land, alleged to have been the statutory homestead of Rux at the time of his death, of which defendant has possession and from which plaintiff seeks to eject her. The case was tried without a jury and the findings were in plaintiff's favor. Defendant appeals from an order denying a new trial.

Defendant is in possession and asserts title under a deed from Rux, and has made improvements for which she claims compensation under the occupying claimant's statute.

Rux married plaintiff in Germany in 1858. They came to the United States in 1870, settling in Indiana, where they lived on a farm until 1890, when the farm was sold and the money received for it divided between them. Immediately thereafter they separated, he leaving her and coming to Minnesota, while she continued to live in Indiana with the children. They were never divorced. Mrs. Rux never saw her husband or heard from him after he left her in 1890.

He came from Indiana to Renville county in this state, where he joined the defendant and with her went to Marshall county, acquired title to 120 acres of land including the land now in litigation, and he and she lived upon and improved it for farming purposes. They lived together as husband and wife, although no marriage ceremony was ever performed. They had six children. In 1908 Rux executed a warranty deed of the entire tract to defendant, reciting a consideration of \$1,000. It was not signed by plaintiff.

In 1909 he died intestate. Thereafter defendant and her children continued to occupy the farm. In September, 1911, plaintiff's daughter ascertained that her father had been living in Marshall county and went there to investigate. She testified that she recognized defendant; that she had previously met her in 1884 or 1885 in Indiana when she had lived for a time with her brother, Gust Adam, on a farm near the Rux home; that defendant inquired whether plaintiff had come with her; that she was then living with her children in a very old house and spoke of building a new one saying: "she couldn't build a new house until after she had made a settlement with my mother."

In 1912 defendant erected a new dwelling house, barn and granary, and made other improvements on the easterly of the two forties here involved. She has also paid the taxes on the land since she got her deed.

In 1916 the probate court of Marshall county made its final decree of distribution of the estate of John Rux, deceased, wherein it was found that the north half of the northwest quarter of section 8, township 155, range 43, which is the land in litigation, constituted his homestead at the time of his death and descended, by virtue of the statutes of this state to plaintiff, as his widow, for the term of her natural life with remainder in fee to her children. A one-third interest in the other forty—the southwest quarter of the southwest quarter of section 5 in the same township and range was decreed to plaintiff in fee. This decree has never been appealed from or modified.

1. When Rux executed the deed to defendant he occupied the house upon the premises conveyed, hence some portion thereof constituted his homestead as defined by G. S. 1913, § 6957; *Kelly v. Baker*, 10 Minn. 124 (154); *Ferguson v. Kumler*, 27 Minn. 156, 6 N. W. 618. As to the homestead, the deed was void because his wife did not join in its execution. G. S. 1913, § 6961; *Barton v. Drake*, 21 Minn. 299. The fact that she was not living with him is of no consequence. Without her signature his deed to his homestead was a nullity. *Murphy v. Renner*, 99 Minn. 348, 109 N. W. 593, L.R.A.(N.S.) 565, 116 Am. St. 418.

2. Upon his death in 1909, the homestead descended to his wife and her children, and their rights therein vested and became absolute as of the day when he died, without any acts on their part or on the part of the probate court. G. S. 1913, § 7237; *Wilson v. Proctor*, 28 Minn. 13, 138 N. W. 830; *Sammons v. Higbie's Estate*, 103 Minn. 448, 115 N. W. 265; *Nordlund v. Dahlgren*, 130 Minn. 462, 153 N. W. 876, Ann. Cas. 1917B, 941.

3. The forty on which the buildings were located when he died and one of the two forties adjoining it constituted his homestead. It was necessary to segregate it from the remainder of the land, and his widow had the right to invoke the aid of the probate court in determining the boundaries of the homestead. G. S. 1913, § 7307; *Wilson v. Proctor*, supra. But that court was without jurisdiction to determine defendant's

claim to the land under her deed from Rux. Admittedly the deed was a valid conveyance to her of an undivided two-thirds of at least one of the three forties described therein. Undoubtedly the west forty in section 8, upon which the original buildings were located, was part of the homestead, but, aside from the final decree, we find nothing in the record to show that the easterly forty was also included in the homestead. Rux acquired title to the three forties by a patent from the United States covering all of them. It does not appear that he ever did or said anything indicating that he had selected the eighty in section 8 as his homestead. Defendant was not a party to the proceedings in the probate court. She has a claim to part of the land under her deed from Rux. She acquired some rights by the deed adverse to the rights of plaintiff as his widow. Her rights do not rest upon a will or the laws of descent, hence, so far as she was concerned, the probate court could not determine that the easterly forty, upon which she had built and where she resided, was part of the Rux homestead, and that plaintiff and her children were the sole owners thereof. This is the effect of the decision of this court in *Odenbreit v. Utheim*, 131 Minn. 56, 154 N. W. 741, L.R.A. 1916D, 421, and of the cases there cited.

There must be a new trial in order to afford both parties an opportunity to produce competent evidence which will enable the district court to determine, as an original question in that court, what land constituted the homestead of Rux when he died.

There are other questions presented by this appeal which are likely to arise again and so we have concluded to indicate our views upon them at this time.

4. Defendant cannot prevail on the strength of her claim of title by adverse possession. Her possession up to the time when Rux died lacked the essential elements of hostility and exclusiveness. They lived together as man and wife in the dwelling house on the land. The testimony that Rux said the land "was for his children and the woman" merely tended to show that he wanted them to have it after he died. Only since his death in 1909 can her possession be said to be adverse.

5. The statute giving to an occupying claimant the right to compensation for improvements made on land from which he is ejected, conditions



the existence of the right upon color of title in fee in the occupant, peaceable possession taken in good faith, the giving of a valuable consideration for the conveyance, and want of actual notice of the claim upon which the action to recover possession is founded, previous to the time of making the improvements. G. S. 1913, § 8070. The record fails to show the existence of at least two of these essentials. The deed to defendant recites payment of a consideration of \$1,000, but there was no proof of the actual payment of any consideration whatever. As a general rule the recital of a consideration in a deed is no evidence against a third person not a party to the deed. Jones, Evid. § 469; 2 Wharton, Evid. §§ 1041, 1042; 2 Dev. Deeds, § 821. The testimony of plaintiff's daughter, if true, showed that defendant knew Rux was a married man, that he had a wife and children in Indiana whom he had abandoned, and that in 1911, a year before she made the improvements, she knew that she would have to settle with plaintiff before she could safely proceed to build. If she had such knowledge, she was chargeable with actual notice of plaintiff's claim before she made the improvements, and hence cannot recover their value, by virtue of the statute.

Order reversed.

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**EUGENE McDONALD AND A. S. McDONALD, COPARTNERS  
DOING BUSINESS AS A. S. McDONALD COMMISSION  
COMPANY v. UNION HAY COMPANY.<sup>1</sup>**

**June 13, 1919.**

**No. 21,149.**

**Sale — oral modification of memorandum — custom of the trade.**

By written memorandum defendant, a dealer in feed at Minneapolis, sold and agreed to ship 300 tons of bran at \$28 per ton to plaintiffs, delivery at Boston or Boston rate points. The bran was not shipped as requested or within a reasonable time. Plaintiffs alleged an oral modification of the contract, whereby the shipment should be made during the last 12 days of April, 1917. Sixty tons were shipped when the modification was made. No further shipments were made, although plaintiffs demanded performance several times during the month of May. A custom in the feed trade requires 24 hours' written notice before either

<sup>1</sup>Reported in 172 N. W. 891.

seller or buyer may be held to have breached the contract. Such notice was not given. In this action for damages it is held:

(1) It was competent to prove the alleged oral modification, though the contract was written and within the statute of frauds.

(2) The custom of the trade entered into the terms of the contract, and under a denial of a breach of the contract, evidence of this custom under which breach was disproved was admissible.

(3) There was nothing irreconcilable between the terms of the oral modification alleged and the operation of the custom proven. And further, plaintiffs' insistence upon performance of the contract after the time specified in the modification waived the time and clearly put in operation the custom referred to.

Action in the district court for Hennepin county to recover \$2,112.50 for breach of contract. The answer alleged that the shipment of bran to plaintiff by defendant was prevented by an embargo on all shipments moving to Boston and Boston rate points, and defendant could not procure from the railroad companies cars in which to ship the bran to such points, and plaintiff failed to furnish defendant with other shipping instructions thereon; that by reason of the inability of defendant to obtain cars, plaintiffs instructed defendant to turn over the bran in such cars as would not be allowed to run east to the E. S. Woodworth Company of Minneapolis, but that company refused to accept 240 tons which defendant tendered to it. The case was tried before Waite, J., who denied defendant's motions for a directed verdict, and a jury which returned a verdict for \$2,215.32. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed.

*David R. Thomas and Frank J. Morley*, for appellant.

*Kerr, Fowler, Schmitt & Furber*, for respondents.

HOLT, J.

Plaintiffs and defendant are dealers and brokers in feed; plaintiffs in Boston and defendant in Minneapolis. In the fall of 1916, defendant sold 300 tons of bran for \$28 per ton, delivered at Boston or Boston rate points, for November shipment. By subsequent agreement the price was changed to \$32 per ton. At the request of plaintiffs in December, 1916, shipment was delayed. However, in January, 1917, and the months fol-

lowing they repeatedly asked that the bran be delivered speedily, but without avail. On April 18, 1917, it is claimed a modification of the sale contract was agreed upon, to the effect that the bran should all be shipped before the expiration of that month. No bran was shipped except 60 tons turned over when the modification was made. This action was brought to recover damages for the breach. Defendant counter-claimed, on the theory that the breach was not on its part, but on plaintiffs'. The trial resulted in a verdict for plaintiffs. Defendant appeals from the order denying its motion in the alternative for judgment or a new trial.

We do not sustain the contention that no valid modification of the written sales contract, on April 18, 1917, was proven by competent evidence. The oral part of the agreement of that date did not alter the terms of the contract, it merely fixed the time within which the merchandise that should have been delivered long before might be delivered under the contract. It went to the performance of a subsisting contract of recognized validity. *Scheerschmidt v. Smith*, 74 Minn. 224, 77 N. W. 34. Moreover, this was not an oral modification of a contract necessarily void unless in writing. True, it was a contract for the sale of goods of the value of more than \$50; but, if part of the goods were delivered and accepted, the contract need not be in writing. Sixty tons of the bran were delivered and accepted under this modification and as part thereof. And there is no trouble with the consideration, for defendant was then in default—more than a reasonable time for dealing had elapsed—and a waiver of this breach was a consideration for defendant's promise to make shipment during April.

There are, however, other difficulties with plaintiffs' case that, in our view, preclude recovery. One of the plaintiffs, the active manager of the business, admitted that there is a custom or usage, prevailing both in Minneapolis and at Boston and Boston shipping points, that a contract of the sort here involved is not breached until after 24 hours' written notice has been served upon the one party by the other within which he must tender for delivery or accept, as the case may be, the merchandise involved in the contract. There was other testimony as to this usage. The evidence as to custom was objected to because not pleaded. It was rightly admitted. Where a general custom or usage prevails in the con-

duct of a trade or business, it enters into and becomes a part of a contract made in that business, unless there is repugnancy between the custom and the terms of the contract in which case the latter control. *Paine v. Smith*, 33 Minn. 495, 24 N. W. 305; *Globe Milling Co. v. Minneapolis Elev. Co.* 44 Minn. 153, 46 N. W. 306. Plaintiffs averred a breach of an alleged contract to deliver during the time therein specified. If the custom of this trade annexed to the contract this condition that no default in delivery could arise until after 24 hours' written notice, served on the seller, that the merchandise would be procured in the open market and the seller held for the loss, it would seem that, under a general denial of the breach alleged in the complaint, the defendant might prove the custom which is but one of the terms or conditions of the contract bearing upon the breach alleged. *Breen v. Moran*, 51 Minn. 525, 53 N. W. 755, holds that a custom, though local, need not ordinarily be pleaded, *Steidtmann v. Joseph Lay Co.* 234 Ill. 84, 84 N. E. 640; *Saginaw Milling Co. v. Schram*, 186 Mich. 52, 152 N. W. 945. As the pleadings stood, the evidence of the usage or custom mentioned was admissible. No written notice to put defendant in default as required by this custom was given.

Plaintiffs, however, seek to avoid the effect of the want of notice in this instance, by the claim that it is not applicable to a case where a definite time for delivery is fixed by the contract. We do not think the claim should be sustained. In the terms of the modification, as testified to by the plaintiff who claimed to have made it, there is nothing excluding the operation of the trade custom referred to. The delivery was on for a day certain, but covered a period of 12 days. In *Lillard v. Kentucky Distilleries & Warehouse Co.* 134 Fed. 168, 67 C. C. A. 74, Judge Lurton says: "In reference to contracts where custom is ordinarily comprehended as part of the agreement the rule, as we understand it to be, is that evidence of such custom and usage is not to be excluded, unless the language employed by the parties is found to be plainly irreconcilable with the rule imposed by the custom." We think the language in which the modification of this contract was expressed is reconcilable with the custom of the trade upon the subject of placing either party in default. *Holder v. Swift* (Tex. Civ. App.) 147 S. W. 690; *S. B. & B. W. Fleisher, Inc. v. Abbott*, 222 Fed. 211, 137 C. C. A. 525. Furthermore,

plaintiffs' conduct indicates that they construed the contract as subsisting in May and open to performance by defendant. If it was, then surely the custom came into play. That brings us to a consideration of waiver of the alleged modification that all the bran should be shipped in April.

Defendant contends that, irrespective of the effect of the custom mentioned, plaintiffs, by demanding delivery after the expiration of the time fixed therefor, waived the right to insist that the breach occurred as of April 30, and that by such conduct defendant was given a reasonable time from the date of the last demand within which to make delivery. Language of text writers and decisions may lend support to the contention of appellant that, where a time limit is fixed for the performance of a contract, a request made, upon the party in default, to perform, after the expiration of the time, waives the breach, and the contract thereafter becomes a subsisting contract with the time limit eliminated, giving the one in default a reasonable time after the request within which to perform. 3 Elliott, Contracts, § 2026; Lowy v. Rosengrant, 196 Ala. 337, 71 South. 439. It may be doubted whether the rule applies where the one in default makes no effort whatever, after the request is made, to perform nor promises so to do. But in this case we have more. On April 30 plaintiffs wrote defendant, knowing that the letter could not be received until after the time limit had expired: "Now, please bend some real efforts to clean up this matter." On May 7 defendant replied: "The writer will keep after this and try to get same straightened out at once." On the same day, and again on May 11, plaintiffs write urging defendant to ship the bran. The next letter from plaintiffs is dated May 17, wherein it is said no reason exists for turning this bran "over to E. S. Woodworth and thereby penalize us for \$1.25 per ton for handling charges \* \* \* we want you to get busy and clean up this contract without further delay." Before this last letter had barely time to reach defendant, plaintiffs, on May 19, wrote declaring that they would sue for damages for a breach of the contract. It appears that during the whole time in question embargoes were placed on the cars belonging to certain railroads, and it was difficult to obtain cars for shipment to eastern points. Some arrangement was made between plaintiffs and defendant, whereby delivery might be made to E. S. Woodworth at Minneapolis who would forward, if defendant could not obtain cars that would go east. On May

22 there was evidently an offer to deliver to Woodworth, but on account of market conditions he refused to accept in behalf of plaintiffs, and they also refused when appealed to by telegram to direct Woodworth to receive shipments of the bran. We think these continued requests in the month of May for performance, coupled with defendant's promise and effort to perform, slight though it be, made the custom and usage above referred to for fixing liability for a breach of the contract clearly applicable. It is said the waiver was induced by defendant's fraud and misrepresentations as to conditions existing at Minneapolis and therefore should not avail. If the excuses given by defendant were false, plaintiffs' correspondence indicates a discovery of the deception prior to the demand of May 17. We think neither party, upon this record, put the other in default under the admitted custom and usage of the trade, hence there can be no recovery of damages. In view of that conclusion the other assignments of error need no discussion.

Order reversed.

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CHARLES D. ZIEGLER v. WILLARD R. CRAY AND ANOTHER.<sup>1</sup>

June 13, 1919.

No. 21,150.

**Action for attorney's negligence — sufficiency of complaint.**

Upon an objection to a complaint upon the ground that the facts alleged do not state a cause of action, first made after the impaneling of the jury and when the taking of evidence is commencing, every reasonable intendment is indulged in favor of its sufficiency. Applying this rule it is *held* that a complaint which alleged that the plaintiff had a cause of action against another for fraud; that the defendant, employed as his counsel to prosecute it, understood that such other had threatened to obtain a discharge in bankruptcy, and would do so and avoid liability unless the action were so conducted that it would result in a judgment based on fraud and therefore not dischargeable; that suit was brought and a verdict rendered for the plaintiff, and that the proceeding was so negligently conducted that the verdict was lost to the plaintiff, is sufficient, although it was not directly alleged that the verdict was based on contract instead of on fraud, nor that the defendant in the action received a discharge in bankruptcy.

<sup>1</sup>Reported in 172 N. W. 834.

Action in the district court for Hennepin county to recover \$5,000 for negligence while acting as plaintiff's attorneys. The separate answer of defendant Cray alleged that two other attorneys were employed by plaintiff at his own instance in the matter of the claim in question, and, after the return by the jury of the verdict mentioned in the opinion, defendant took no further steps or proceedings and with the consent of plaintiff ceased to act as his attorney in the action. When the case came on for trial before Molyneaux, the jury had been called and sworn, and a witness for plaintiff had been sworn, defendant Cray's objection to the introduction of any evidence on the ground that the complaint did not state a cause of action was sustained, and his motion to dismiss the action was granted. From the judgment dismissing the action on the ground that the complaint did not state a cause of action, and from the order denying his motion for leave to amend the complaint, plaintiff appealed. Reversed.

*Walter P. Wolfe and James Manahan*, for appellant.

*Keith, Kingman, Cross & Wallace*, for respondent.

DIBELL, J.

This is an action to recover damages alleged to have been sustained by the negligence of the defendant while acting as attorney of the plaintiff. The plaintiff appeals from the judgment for the defendant. The question argued at length is whether the complaint states a cause of action.

Objection to the sufficiency of the complaint was first made after a jury was impaneled and when a witness was on the stand and evidence was about to be taken. Upon an objection so made every reasonable intendment is indulged in favor of the sufficiency of the complaint. *Dunnell*, Minn. Dig. and 1916 Supp. § 7687, and cases cited.

The plaintiff had a cause of action against one Suggit for money obtained by fraud and misrepresentation. The defendant and another were counsel for the plaintiff. The complaint alleges:

"That at the time of undertaking the said employment, by the defendants, plaintiff fully and fairly disclosed all the facts of said case to the defendants, and the defendants well knew and understood that the said John Suggit against whom said claim was to be brought, had procured money from the plaintiff by fraud and misrepresentation and

that the said Suggit warned the plaintiff and the defendants, that if a judgment was procured against him, that he would immediately file a petition in bankruptcy and have the same discharged, and the defendants well knew and understood that a complaint was to be framed in said action on the ground of fraud and misrepresentation so that a verdict and judgment rendered thereon would not be discharged by operation of the Federal Bankruptcy Law, and that defendants well knew and understood that in prosecuting said case and the trial thereof that the object and theory was to have a judgment therein that could not be discharged in bankruptcy."

It is then alleged that an action was brought and a trial had which resulted in a verdict for the plaintiff for \$2,000. It is further alleged that the defendant did not use due care and skill in the prosecution of the action and in the conduct of the trial and that by reason of his negligence the verdict was lost to the plaintiff. It is not alleged that Suggit went into bankruptcy or that there was a discharge in bankruptcy. It is not alleged whether the verdict was recovered upon contract or on fraud. There is the specific allegation that the cause of action was one properly based on fraud and that it was understood to be important that the judgment be for fraud so as to avoid the effect of a discharge in bankruptcy. There is a final allegation that by reason of the negligence of the defendant the verdict against Suggit was wholly lost to the plaintiff.

We have reached the conclusion that it was error to sustain the objection to the admission of testimony upon the ground that the complaint did not state a cause of action. The rule by which we must be guided we have stated. The complaint is indefinite and is subject to numerous just criticisms. An allegation of negligence is largely one of ultimate fact. The defendant was entitled, on motion, to have the charges of the complaint made definite and specific. No objection to the complaint was suggested until the trial had commenced. Indulging every intendment in favor of the sufficiency of the complaint we hold that it was error to sustain the objection.

Order reversed.

BROWN, C. J. (concurring).

Although it appears quite probable that plaintiff has in fact no cause



of action on the merits, it does not conclusively so appear, and I therefore concur in a reversal for the reasons stated in the opinion of the court.

HOLT, J. (dissenting).

I dissent.

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GROSS IRON ORE COMPANY v. LEONARD PAULLE.<sup>1</sup>

June 13, 1919.

No. 21,184.

**Mortgage of corporation — notice to mortgagee.**

1. Plaintiff's president procured a loan from defendant and gave the note of the corporation and a mortgage on land of the corporation as security. The loan was in fact procured for the personal use of the president and was received by him and so used. The evidence sustains a finding that defendant had notice of the purpose for which the loan was procured.

**Condition precedent to cancelation — refund of taxes.**

2. Defendant cannot complain that the court imposed as a condition to the annulment of the note and mortgage, the payment to defendant of the amount of certain taxes paid by the president for plaintiff.

After the former appeal reported in 132 Minn. 160, 156 N. W. 268, the case was tried before Rockwood, J., who made findings and ordered that upon payment into court by plaintiff for the use of defendant of the sum of \$187.57, the amount paid out by Gross for taxes, judgment should be entered canceling the mortgage given by plaintiff to defendant. From an order denying his motion for additional findings or for a new trial, defendant appealed. Affirmed.

*Laybourn & Cary*, for appellant.

*Cobb, Wheelwright & Dille* and *George Hoke*, for respondent.

HALLAM, J.

In March, 1909, Ludwig Gross secured from defendant a loan of

<sup>1</sup>Reported in 172 N. W. 907.

\$3,000 and as security for its repayment gave the note of plaintiff and a mortgage on certain of its land in Lake county. Gross was president, treasurer and sole manager of plaintiff. The note and mortgage were executed in the name of the company by Gross as president and D. A. Scrimgeour as secretary. The money borrowed was paid to Gross by a check to his order and was appropriated by him to his own personal use. Plaintiff brought this action to set aside the note and mortgage, alleging, among other things, that it never received said \$3,000 or any part of it, all of which, it alleged, defendant well knew at the time of the execution and delivery of the note and mortgage. The case was tried by the court without a jury. Judgment was ordered annulling the note and mortgage. The court found that the proceeds of the mortgage were diverted by Gross to his personal use, but made no finding on the question of defendant's knowledge or notice of the misuse or proposed misuse of the fund. On appeal this court held such knowledge or notice a prerequisite to the granting of any relief and remanded the case for a new trial of the one issue, "as to whether defendant was chargeable with notice that Gross borrowed the amount which the mortgage was given to secure, for his personal use." *Gross Iron Ore Co. v. Paulle*, 132 Minn. 160, 156 N. W. 268. On the second trial the trial court found this issue in favor of the plaintiff. Defendant again appeals.

The only question on this appeal is whether there is evidence to sustain this finding. In our opinion there is. Gross gave this testimony as to the conversation at the time the loan was negotiated: "I told him that I needed money, that I was financially pressed and that I wanted this money, that I would secure him \* \* \* that I had advanced money for the Gross Iron Ore Company, and that I would secure him with a mortgage on its property." This, in connection with the fact that money was paid by check to Gross' personal order, is sufficient to sustain the finding of the court that defendant had notice that the loan was being negotiated by Gross for his own personal use.

The court imposed as a condition to the annulment of mortgage the payment by plaintiff to defendant of \$187.57, the amount which plaintiff owed Gross for the taxes paid by him on plaintiff's land. Plaintiff does not complain of this. Defendant cannot. To this extent the decision favors defendant. This part of the decision was in no sense a partial

annulment of an entire transaction. It simply attached a condition to complete annulment of the note and mortgage.

Order affirmed.

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STATE v. BERNHARD REMPEL.

STATE v. PETER W. REMPEL.<sup>1</sup>

June 18, 1919.

Nos. 21,204, 21,205.

**War — aiding United States — verdict not sustained by evidence.**

The evidence does not sustain a finding that the two defendants, holding a conversation between themselves on their own property, in which they made disloyal and unpatriotic remarks, overheard by another, taught or advocated by oral speech that the citizens of the state should not aid and assist the United States in prosecuting or carrying on the war with its public enemies within the prohibition of Laws 1917, c. 463.

Defendants were separately indicted by the grand jury of Watonwan county charged with the crime of advocating by oral speech that the citizens of Minnesota should not aid or assist the United States in prosecuting war with its public enemies, tried in the district court for that county before Comstock, J., and a jury which returned verdicts of guilty as charged in the indictments. From the judgments entered on the verdicts, defendants appealed. Reversed.

*C. J. Laurisch*, for appellants.

*Clifford L. Hilton*, Attorney General, *James E. Markham*, Assistant Attorney General, and *J. L. Lobden*, County Attorney, for respondent.

DIBELL, J.

The defendants Bernhard Rempel and Peter W. Rempel were separately indicted and on separate trials each was convicted of wrongfully and unlawfully advocating by oral speech that the citizens of the state should not aid and assist the United States in prosecuting and carrying on the war with its public enemies. Each appeals from the judgment of

<sup>1</sup>Reported in 172 N. W. 838.

conviction entered. The appeals were argued together and are conveniently considered together.

The two Rempels live in the village of Butterfield, Watonwan county. Both were born in Russia. On Sunday, July 21, 1918, between eight and nine in the morning, they were sitting on a bench in the dwelling house yard of one of them, talking together. The village hotel was on the adjoining lot. The backs of the two men were toward the hotel. One of them had the St. Paul Pioneer Press and the other the Nonpartisan Leader. One Klein occupied a room on the second floor of the hotel. He says he was some 24 feet away from the men. When he awakened in the morning they were talking together. He claims that he heard Bernhard say to Peter in Mennonite: "The Germans \* \* \* are just going back far enough so that our boys get into some trap and \* \* \* pound hell out of them, just what they deserve." And that Peter replied: "It will be but a few days and the Germans will be in Paris and I would like to see that." The indictments are founded on the language quoted. No one else was in hearing of the two Rempels. They did not know that Klein was. They were having a talk between themselves and the two newspapers mainly suggested the subject matter of their conversation.

They deny that they said anything of the kind claimed. They say that they were talking over general war news and some local matters. The evidence is not at all conclusive and in some respects not very convincing that they made use of the words ascribed to them. They were heard under unfavorable conditions for accurate understanding and repetition. If they did use them they evidenced their disloyalty and want of patriotism. It is evident that the local feeling against the two was active.

Conceding that they said precisely what is alleged, they did not, within Laws 1917, p. 765, c. 463, "teach or advocate \* \* \* by oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States." This statute has been construed many times. *State v. Gilbert*, 141 Minn. 263, 169 N. W. 790, and cases cited; *State v. Townley*, 140 Minn. 413, 168 N. W. 591, and cases cited; *State v. Freerks*, 140 Minn. 349, 168 N. W. 23. The statute does not reach two individuals who get together as these two men did and express their views though they are disloyal and unpatriotic views. Upon any permissible construction of

the statute there was not a teaching or advocating that citizens should not support the government within the meaning of the statute and the conviction is not sustained.

Judgment reversed.

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STATE v. JOHN REMPEL.<sup>1</sup>

June 13, 1919.

No. 21,206.

**War — aiding United States — evidence insufficient.**

The evidence does not sustain a finding that the defendant, who, while being taken to jail upon his arrest, made a derogatory remark about the government, nothing being said about the war or its prosecution, thereby advocated by oral speech that the citizens of the state should not aid the United States in prosecuting or carrying on the war with its public enemies within the prohibition of laws 1917, c. 463.

Defendant was indicted by the grand jury of Watonwan county charged with the crime of advocating by oral speech that the citizens of Minnesota should not aid or assist the United States in prosecuting war with its public enemies, tried in the district court for that county before Comstock, J., who at the close of the testimony denied defendant's motion for a directed verdict of not guilty, and a jury which returned a verdict of guilty as charged in the indictment. From the judgment entered on the verdict, defendant appealed. Reversed.

*C. J. Laurisch*, for appellant.

*Clifford L. Hilton*, Attorney General, *James E. Markham*, Assistant Attorney General, and *J. L. Lobden*, County Attorney, for respondent.

DIBELL, J.

The defendant, John Rempel, was indicted for wrongfully and unlawfully advocating by oral speech that the citizens of the state should not aid and assist the United States in prosecuting the war with its public enemies in violation of Laws 1917, p. 764, c. 463. He appeals from a judgment of conviction.

<sup>1</sup>Reported in 172 N. W. 919.

Rempel was arrested in the village of Butterfield, Watonwan county, on July 21, 1918. He was being taken to the county jail at St. James by a number of volunteer citizens in an automobile. Rempel asked one of the men who was paying him, and he replied that he was working for the government free of charge. Rempel then said: "To hell with this government. We will have a government that will fix you fellows." Rempel denies that he used this language. The evidence that he did is sufficient. He says that the language he did use had some reference to the state government. The evidence suggests that there was some feeling in the community against Rempel and that his loyalty was in question. He had been active in local controversies. It also appears that his three sons were in war service for this country. The language which he used and as it was used cannot be construed as teaching or advocating that the citizens of the state should not assist the United States in its war with its public enemies, within the prohibition of the statute. See *State v. Rempel*, supra, pages 50, 51, 172 N. W. 888, and cases cited. The war was not under discussion nor was it mentioned. The conviction is without a basis in the evidence.

Judgment reversed.

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IN RE ESTATE OF FRIEDRICH MALCHOW, DECEASED.

MARGARET MALCHOW v. PAULINE MALCHOW AND  
OTHERS.<sup>1</sup>

June 13, 1919.

No. 21,233.

**Antenuptial contract.**

1. Antenuptial contracts are not against public policy, but are regarded with favor as conducive to the welfare of the parties making them, and will be sustained whenever equitably and fairly made.

**Fraud — unfair dealing by person holding fiduciary relation — presumption — burden of proof.**

2. Fraud will be presumed when there has been a transaction between persons occupying a fiduciary relationship, whereby one in whom

<sup>1</sup>Reported in 172 N. W. 915.

confidence was reposed, or who possessed controlling influence over the other, obtained benefits without consideration, or for an inadequate consideration. The onus is on a person obtaining such benefits to show that he acted righteously.

**Same — when contract is valid.**

3. There can be no valid contract between two persons except after a full and a fair communication and explanation of every material particular within the knowledge of the one who seeks to uphold it against the other, if it appears that the former possessed influence which he abused, or had gained confidence which he betrayed.

**Same — inadequacy of consideration — antenuptial contract.**

4. In determining the validity of a contract between parties when one stands in a fiduciary relation to the other, inadequacy of consideration is an important factor, but no obligation rests upon a man about to marry to secure to his prospective wife a due proportion of all his property, under penalty, if he does not, of having his contract with her decreed *prima facie* a fraud upon his part.

**Antenuptial contract — evidence.**

5. The relations of a man and woman betrothed to one another are presumably, but not invariably, confidential. Under the evidence the trial court was not bound to find that the parties to the antenuptial contract here involved occupied a confidential relationship when it was executed.

Margaret Malchow elected not to take under the will of her husband, Friedrich Malchow, and appealed from an order of the probate court for Jackson county disallowing her application to take under the statute and from an order refusing her a widow's allowance for maintenance. The appeals were heard in the district court for that county before Dean, J., who found that the antenuptial agreement between the parties was a valid, existing and binding contract; that she was not entitled to receive any part of the estate of her deceased husband, Friedrich Malchow, except the sum of \$2,000, and affirmed the orders of the probate court in the distribution of property. Her motion for amended findings was denied. From an order denying her motion for a new trial, Margaret Malchow appealed. Affirmed.

*E. H. Nicholas, H. C. Carlson and H. H. Dunn, for appellant.*

*S. B. Wilson, for respondents.*

LEES, C.

On February 23, 1909, Friedrich Malchow, a widower 65 years old, and appellant, a widow of 53, were married. He was the father of 12 children, and she the mother of 8. Both were engaged in farming, he in Jackson county, Minnesota, and she in Barron county, Wisconsin. Their acquaintance began in December, 1908, when he came to her home with a neighbor who introduced them. He remained one day and they talked of marriage, but she told him she did not want to leave her farm as there were debts against it. About two weeks later he returned and spent another day at her home. There was further talk of marriage. He advised her to transfer her farm and personal property to two of her sons, saying that if she married him he would take good care of her and that her two youngest children could come with them to Jackson county. She promised to marry him, and February 23 was set as the date for their marriage. He returned to his home and there was some correspondence between them, but none of his letters were preserved. He came back on February 20 and told her he was expecting a paper by mail and that they could not get married until it came. She asked him what it was and he said: "That is a paper \* \* \* that each widow woman has to sign when she got married the second time." She said she did not have to sign one before, and he replied: "Why that is different \* \* \* when a widow woman gets married the second time they have to sign that paper." The paper came the day before they were married. She did not read it and he did not explain it to her. They went together to the office of the county clerk of Barron county. She told the clerk she did not know what the paper contained. He then read it to her in Malchow's presence and asked her if she understood it. She looked as if she did not. He read part of it again and explained that it meant that she would get \$2,000 from Malchow's estate if he died first, and no more. She said that was all right as she had some property and expected to get a good home. It was then signed in his presence and in the presence of the county judge, who took the parties' acknowledgment. The entire transaction occupied but a short time. The county judge corroborated the testimony of the county clerk, of which the foregoing statement is an abridgement.



The document thus executed was an antenuptial contract. By its terms appellant was to get \$2,000 in lieu of all provisions made by the laws of Minnesota for the widow of an intestate, and Malchow waived all rights he might have in her property in case he outlived her. In fact she then had no property, having shortly theretofore transferred all of it to her two sons in accordance with Malchow's suggestion. Part of her real property was subsequently reconveyed to her. The next day they were married and within a few days went to Jackson county, where they lived together until December, 1914, when Malchow died. He left a will which was admitted to probate. It recited the provisions of the contract and bequeathed \$2,000 to appellant in fulfillment thereof. He made no other bequest in her favor. His estate, after paying all charges against it, consisted of a homestead in Lakefield worth about \$3,500 and \$28,010.52 in money and securities. She was not satisfied with what he gave her and applied to the probate court for a widow's statutory allowance and distributive share in the estate, and appealed to the district court from orders denying her applications. The orders of the probate court were affirmed, a motion for a new trial denied, and the case comes here on appeal.

There were findings that when appellant married Malchow she did not know the extent of his property and made no effort to ascertain what he owned, but was assured by him that he had enough to keep them; that she had ample opportunity after marriage to learn of his financial condition, but did not concern herself about it or about the antenuptial contract; that she did not assist him in accumulating any of the property he left; that no misrepresentation or fraud was practiced upon her; that she was fully advised as to and knew the contents of the contract when she signed it, and that she is a woman of good mind and ability and was capable of understanding the nature and effect of the contract in question.

A careful examination of the record has satisfied us that the evidence sustains these findings, and we pass directly to a consideration of the question whether, as a matter of law, the court was right in concluding that appellant was not entitled to be relieved from the obligations of her contract.

A man and woman in the situation of these parties frequently agree, before marrying a second time, that their property shall ultimately go to their children by the first marriage. The ties of blood relationship are strong. But for their existence, few antenuptial contracts would be made. Their purpose is to alter the interest which each of the parties would take in the property of the other had the contract not been made. A bona fide and reasonable agreement, securing to the wife the enjoyment of a portion of her husband's property during coverture, or after his death, will be enforced. It has always been permitted that a man and woman contemplating marriage may fix their property rights by agreement, equitably and fairly made, and exclude the operation of the law in respect to fixing such rights. *Desnoyer v. Jordan*, 27 Minn. 295, 7 N. W. 140; *Hosford v. Rowe*, 41 Minn. 245, 42 N. W. 1018. In *Appleby v. Appleby*, 100 Minn. 408, 111 N. W. 305, 10 L.R.A.(N.S.) 590, it was said that "marriage settlements \* \* \* are matters of history and have been upheld and sustained by the courts from the earliest times. They are not against public policy, but, on the contrary, are regarded with favor, as being conducive to the welfare of the parties and subservient to the best purposes of the marriage relation, and are uniformly sustained when free from fraud or not expressly prohibited by some statute." Such is the doctrine of the courts quite generally. *Schouler*, Dom. Rel. § 173; *Bibelhausen v. Bibelhausen*, 159 Wis. 365, 150 N. W. 516; *Johnston v. Spicer*, 107 N. Y. 185, 13 N. E. 753; *Buffington v. Buffington*, 151 Ind. 200, 51 N. E. 328; *McGee v. McGee*, 91 Ill. 548. The right to make antenuptial contracts is recognized by statute in this state. G. S. 1913, § 7150. There is nothing inherently suspicious or bad about them. In the absence of fraud or imposition upon one of the parties by the other, they ought to be sustained.

The contention in the case at bar is that a constructive fraud was perpetrated upon appellant because Malchow did not tell her what he was worth or what his property consisted of, or what her rights in it would be if she became his widow, and so procured her execution of the contract for an inadequate consideration. Fraud will be presumed when there has been a transaction between persons occupying a fiduciary relation whereby the one in whom confidence is reposed, or who possesses

controlling influence over the other, obtains a benefit or advantage, either without consideration or for an adequate consideration. The onus is on the person obtaining such benefits to show that he acted righteously, and on grounds of public policy undue influence will be *prima facie* presumed from the peculiar relations subsisting between the parties to the transaction. An apt statement of these principles is found in 1 Story, Eq. Jur. §§ 430, 431, where it is said: "If confidence is reposed, it must be \* \* \* preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interests \* \* \* and overreaching bargains." These principles have been applied by this court to cases involving contracts: *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. 918; *Shevlin v. Shevlin*, 96 Minn. 398, 105 N. W. 257; *Slingerland v. Slingerland*, 115 Minn. 270, 132 N. W. 326; to the case of a will procured by undue influence, *Fischer v. Sperl*, 94 Minn. 421, 103 N. W. 502, and to a case involving the assent of a wife to the provisions made for her by her husband's will. *State v. Probate Court of Hennepin County*, 129 Minn. 442, 152 N. W. 845, L.R.A. 1915E, 815.

This case is akin to those cited, in that it is sought to avoid a contract essentially on the ground of constructive fraud, or fraud presumed from the circumstances and condition of the parties contracting. The outcome of actions of this character depends on the presence or absence of influence acquired and abused, or confidence reposed and betrayed. If these elements are present, there can be no valid contract between two persons except after a full and fair communication and explanation of every material particular within the knowledge of the one who seeks to uphold it against the objections of the one who trusted him. The confidential relation, of itself, is *prima facie* evidence of fraud. *Bispham*, Prin. of Eq. §§ 231, 232. Inadequacy, or the absence of consideration, is always an important factor. It is present here, for appellant gets, by the contract, but a small portion of what she would otherwise get under the statutes. Standing alone, it is not sufficient ground for avoiding the contract. No obligation rests upon a man about to marry to secure to his prospective wife any proportion, due or otherwise, of all his property, under penalty, if he does not, of having his antenuptial contract with

her decreed prima facie a fraud upon his part. *Russell v. Russell*, 60 N. J. Eq. 282, 47 Atl. 37.

In addition to inadequacy of consideration, there must be a confidential relationship between the parties before fraud will be inferred. Persons under contract to intermarry are presumed to stand in a confidential relation to each other. They are not in the same category as buyers and sellers who deal at arm's length. *Kline v. Kline*, 57 Pa. 120, 98 Am. Dec. 206; *Graham v. Graham*, 143 N. Y. 573, 38 N. E. 722; *Barker v. Barker*, 126 Ala. 503, 28 South. 587; 1 Page, Contracts, § 190. But the presumption is not conclusive that a man obtains the confidence of or gains a controlling influence over the woman he is pledged to marry, merely because they have agreed to intermarry. Marriages of convenience take place in which the impulses of sentiment play no part. They are of a purely business character. The woman may have no greater confidence in her intended husband than she has in other acquaintances, and he may have no greater influence over her actions than they have. Such seems to have been the case here. The parties were comparative strangers when they married. Malchow wanted a housekeeper. His wooing was brief and businesslike. He first offered appellant a good home, and later, by the antenuptial contract, \$2,000 after he died. She was in debt, her land was of comparatively small value, her older children were about to start in life for themselves, and she appears to have desired a home for herself and her two younger children, and so she accepted the offer. There was no courtship or engagement in the usual sense of those expressions. Apparently there was an entire absence of professions of affection on either side. He began to talk marriage at his first meeting with her, and, at the second, it was agreed upon. He was not her superior in intelligence or worldly experience. The element of control over her actions was not present and there was an absence of long association resulting in the repose of her entire confidence in him. These were the important features in *Slingerland v. Slingerland*, supra, and *State v. Probate Court of Hennepin county*, supra.

The trial court failed to find that Malchow had gained appellant's confidence or that he possessed influence over her. Appellant moved for

an amendment to the findings which would establish the existence of these essential elements in her case. The court refused to make the amendment. This is equivalent to a finding negating their existence. The evidence is not so conclusive as to have made it the duty of the court to find that they did exist. If the amendment had been made, it would have found sufficient support in the evidence. It cannot be said of the findings as they stand, that they are manifestly contrary to the weight of the evidence, and hence the case must be disposed of as though the parties dealt at arm's length in making the contract. If they did, the facts as found by the trial court do not entitle appellant to be relieved from the obligations of her contract.

Order affirmed.

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WESTERN ASSURANCE COMPANY v. WELLS, FARGO & COMPANY.<sup>1</sup>

June 13, 1919.

No. 21,236.

**Carrier — alternative rates on interstate commerce — declared value on shipment.**

Under the Cummins Amendment of August 9, 1916, to the Interstate Commerce Act (U. S. Comp. St. 1916, § 8604a), a common carrier of interstate commerce is required to obtain, by order of the Interstate Commerce Commission, the right to adopt alternative rates based on declared values of the shipment, and, the carrier not having done so, the shipper is not restricted, in an action to recover for loss of the shipment, to such declared value.

Action in the district court for Ramsey county to recover \$1,547.99. The facts are stated in the opinion.

Among other matters the answer alleged that the shipment of merchandise was tendered to, received and carried by defendant subject to its classifications and tariffs in effect on the date of the shipment, and upon certain terms and conditions embodied in an agreement in writing for the carriage of the shipment, which was attached to and formed a

<sup>1</sup>Reported in 173 N. W. 402.

part of the receipt given to the shipper by defendant, and was duly agreed upon and accepted by the shipper at the time of shipment; that the receipt and terms and conditions of carriage of the shipment were embodied in a certain book of receipts having those terms and conditions of carriage printed on the inside front cover thereof, a copy of which receipt and a copy of which terms and conditions of carriage were incorporated in the answer.

The answer further set up that defendant was authorized by order of the Interstate Commerce Commission to establish rates for the transportation of furs which were dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of such property; that at the time in question defendant's charge for the transportation from St. Paul to Winifred, Montana, of a shipment of furs of a value not exceeding \$50 and weighing 24 pounds was \$1.29, and the charge for the transportation of a shipment of furs valued at \$1,547.99, and weighing 24 pounds, was \$2.79, and at the time the shipper had actual notice that defendant's charges for carrying such property were based upon the character of the property, of which its value was an element.

The answer also set up the condition of the contract of shipment which is quoted in the seventh paragraph of the opinion, and alleged that at no time prior to the presentation to defendant of the claim of the shipper for the loss of the shipment did defendant have any knowledge or information sufficient to form a belief as to the specific character of the merchandise in the package or as to its actual value, or as to whether the same was worth in excess of \$50, and on information and belief alleged that the shipper intentionally omitted stating in writing or otherwise to defendant the actual value of the shipment for the purpose of obtaining the benefit of defendant's tariff charge on shipments not exceeding \$50 in value.

The case was tried before Dickson, J., who made findings and ordered judgment in favor of plaintiff for \$50. From an order denying its motion to amend the findings and conclusions or for a new trial, plaintiff appealed. Reversed.

*Moore, Oppenheimer & Peterson*, for appellant.

*Davis, Severance & Olds*, for respondent.

QUINN, J.

Plaintiff is an insurance company, the defendant is a common carrier of express for hire, and E. Albrecht & Son are fur merchants at St. Paul, Minnesota. Albrecht & Son make many shipments by express. Defendant had provided them with a blank form receipt book for the purpose of receipting therein for parcels to be shipped by it. On November 18, 1916, Albrecht & Son placed three fur coats of the value of \$1,547.99 in a box 12x24x36 inches in size and weighing 24 pounds, properly addressed to the consignee at Christina, Montana. The value of the coats was not marked on the box, nor was the defendant informed of such value.

On that day defendant's representative called for the package, receipting for the same in the book referred to. The shipper's clerk prepared the receipt, but did not fill in the spaces as to the value or contents of the package. Nor did the defendant's agent inquire about the same. The package was then delivered to the defendant's shipping clerk who made out the waybill and indorsed thereon, box of furs, value not given. He then looked up the shipping rates and found the same to be \$1.29 on the basis of a valuation of \$50. Had the alleged value of the package been given the rate would have been \$2.79.

There was no express agency at Christina, and the defendant shipped the package to its agency at Winifred, Montana, the nearest and most convenient express agency to Christina. The package arrived at Winifred in due season, but before the consignee was notified of its arrival it was destroyed by fire on November 27, 1916, while in defendant's warehouse. Albrecht & Son carried insurance with the plaintiff against loss or damage arising from the perils of shipping furs by express, and thereafter plaintiff paid them \$1,547.99 on account of such loss, and took an assignment of the claim and demand against the defendant for the value of the lost package.

Plaintiff bases its claim and right to recover in this action upon the assignment by Albrecht & Son of their claim against the defendant express company for \$1,547.99, the alleged value of the furs lost through the negligence of the defendant and the breach of its contract of carriage. The trial court made findings and ordered judgment against the defendant for the sum of \$50, with costs and disbursements. Plaintiff moved

for an order amending the findings and conclusions, which was denied, and from an order denying its motion for a new trial brought this appeal.

There is no dispute but that the shipment was an interstate shipment and that the provisions of the Interstate Commerce Act apply. It is contended on behalf of the plaintiff that defendant is liable for the value of the lost package under the so-called Cummins Amendment, and that in no event could defendant's liability be limited to less than the amount of the value of the shipment, in the absence of an order of the Interstate Commerce Commission authorizing the making of rates based on an agreed or declared valuation; that no such order had been promulgated at the time of the shipment or loss. It further contends that in no event would there be a limitation of liability to a less amount than the value of the lost articles where the consignment was destroyed by fire caused through negligence of the carrier.

Upon the other hand, the defendant contends that the express receipt given to Albrecht & Son constituted a valid contract in which there was a limitation of liability on its part to \$50, that such limitation of liability was authorized by an order of the Interstate Commerce Commission issued prior to the amendment of March 4, 1915, and that the form of the receipt referred to was as follows: "Wells, Fargo & Co. Express at \* \* \* Received from \* \* \* the shipments hereinafter listed, subject to the Classifications and Tariffs in effect on the date hereof, which shipments the Company agrees to carry upon the terms and conditions printed on the inside front cover of this book, to which the shipper agrees, and as evidence thereof accepts this receipt. NOT NEGOTIABLE."

Below such printed matter the page was ruled vertically dividing it into several columns for the date, description of article, value, consignee, destination, charges, C. O. D. and signature of company. Upon it appeared the date, the name of consignee, destination and the signature of defendant's representative who receipted for the package. The other columns, including those for the value and description, were left blank. Among the terms and conditions printed on the inside front cover of the receipt book referred to appeared the following:

"The rate charged for carrying said property is dependent upon the



actual value of the property, which must be specifically stated in writing by the shipper, and applies only upon property of an actual value not exceeding Fifty dollars for any shipment of 100 pounds or less, or not exceeding Fifty cents per pound, actual weight, for any shipment in excess of 100 pounds. If the actual value is greater than Fifty dollars for any shipment of 100 pounds or less, or exceeds Fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, such actual value must be specifically stated in writing by the shipper, and excess charges for such greater value must be paid therefor in accordance with the lawfully published tariffs of the Company."

The rights and liabilities of the parties to this action depend upon the construction to be placed upon the Act of Congress of June 29, 1906, and the amendments thereto regulating interstate commerce. By the amendment of March 4, 1915, known as the Cummins Amendment, it was provided that: "No contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier \* \* \* shall be liable \* \* \* for the full actual loss, damage, or injury to such property \* \* \* notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt, or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void."

It is obvious from a reading of the foregoing amendment that it was the purpose of Congress to abolish the rule established by the courts restricting liability to the valuation upon which the rate paid was based. *McCaull-Dinsmore Co. v. Chicago, M. & St. P. Ry. Co.* 252 Fed. 664; *In re Cummins Amendment*, 33 I. C. C. 682. Under that amendment the contract upon which the defendant claims the plaintiff's damages were limited in this case, was void and of no effect. The Cummins Amendment was conditionally qualified by a subsequent act of Congress passed August 9, 1916. U. S. Comp. St. 1916, § 8604a.

As bearing upon this amendment the holding of the Interstate Commerce Commission in *Williams Co. v. Hartford & N. Y. Transp. Co.*

48 I. C. C. 269, decided January 7, 1918, seems to be decisive of the case at bar. It is there stated that: "By the amendment of August 9, 1916, the proviso last referred to was amended so as to provide that the provisions respecting liability for full actual loss, damage, or injury and declaring any limitation thereof to be unlawful and void shall not apply to baggage or to property, except ordinary live stock, on which the carrier has been or shall thereafter be authorized or required by order of the commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of the act. The rates assailed were in effect on August 9, 1916. No authority has been granted by us for their publication in terms of value."

Under this rule the plaintiff in this action is entitled to recover the full value of the lost package regardless of the contract limitation relied upon by the defendant, unless it appears that the Interstate Commerce Commission, prior to the shipment, had made an order authorizing the carrier to enter into a contract limiting its liability in this particular class of cases. It follows that the defendant being required to obtain, by order of the Interstate Commerce Commission, the right to adopt alternative rates based on declared or stated values of the shipment, and it not appearing to have done so, the decision that the plaintiff is restricted in its recovery to such stated value of the shipment, is not warranted by the facts in the case and a new trial must be granted. Reversed.

On July 18, 1919, the following opinion was filed:

PER CURIAM.

In denying defendant's application for a rehearing in this cause we take occasion to say, that there may be no misunderstanding as to the position of the court in the matter, that in our view of the question a prospective operation and effect must be given to the clause found in the Cummins Amendment of August 9, 1916, to the effect that the declared liability of the carriers for the actual loss shall not apply to contracts of limitation authorized by order of the Interstate Commerce Commission.

That proviso or exception should not be construed to apply to orders made by the commission prior to the amendment of March 4, 1915.

The application for rehearing is denied. Plaintiff's application for modification of the opinion is also denied.

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**NATIONAL SURETY COMPANY v. E. J. WINSLOW.  
GRANT, SMITH & COMPANY AND OTHERS, GARNISHEES.  
PAUL J. KALMAN AND OTHERS, APPELLANTS.<sup>1</sup>**

June 18, 1919.

No. 21,261.

**Contract — equitable lien.**

1. The contract recited in the opinion, disclosing certain financial and business relations between defendant and interveners, *held* not to vest in the latter any right, by way of equitable lien or otherwise, to the fund in litigation superior or paramount to that of a garnishment creditor.

**Partnership — joint adventure.**

2. The contract did not create the relation of joint adventure or copartnership and no right to the fund arises from any source of that kind.

**Assignment of debt — statutory presumption of fraud — burden of proof.**

3. The presumption created by G. S. 1913, § 7017, that an unfilled assignment of a debt is fraudulent as to creditors of the assignor can be overcome only by facts showing that the assignment was made in good faith and for a valuable consideration, and the burden of proof is with the assignee.

**Same — evidence.**

4. Evidence that the assignor was indebted to the assignee at the time of the assignment in an amount exceeding the assigned debt, with no evidence that the assignment was made and accepted, in pro tanto discharge of the debt, or as good faith security for its payment, and no evidence that the assignment was not colorable merely, *held* insufficient to require the conclusion that the presumption was overcome.

**Same — evidence insufficient.**

5. The mere existence of the indebtedness from the assignor to the

<sup>1</sup>Reported in 173 N. W. 181.

assignee will not justify the court in assuming that the assignment was made in discharge thereof or as further security for the payment of the same, or in good faith.

**Same — consideration — recital of value received.**

6. The recital in the assignment of "value received," though as between the parties prima facie evidence of a valuable consideration, and a sufficient expression thereof to satisfy the statute of frauds, is not evidence against third persons in proof of a consideration in fact, or of the good faith of the transaction, sufficient to overcome the statutory presumption of fraud.

Paul J. Kalman and George E. Routh, Jr., partners as Paul J. Kalman Company, filed their complaint in intervention in the attachment and garnishment proceedings in the above entitled action in the district court for Ramsey county. The facts are given in the opinion. The case was tried before Brill, J., who made findings and as conclusions of law found that the contract of April 28, 1915, did not create an equitable lien upon the money in the Capital Bank, nor upon the money in the hands of Grant, Smith & Company; that the instrument of assignment of December 27, 1915, was void as against the garnishment of plaintiff; that plaintiff was entitled to satisfy its judgment from the funds disclosed by the garnishees. Interveners' motion for amended findings was denied. From the judgment entered pursuant to the order for judgment, interveners appealed. Affirmed.

*Moore, Oppenheimer & Peterson*, for appellants.

*Orr, Stark & Kidder*, for respondent.

BROWN, C. J.

At the time of the commencement of this action, on December 27, 1915, a garnishee summons was duly issued therein to and subsequently served upon the Capital National Bank, a corporation, and Grant, Smith & Company, a copartnership. The bank subsequently disclosed that it had in its possession and control belonging to defendant in the action the sum of \$957, made up of a bank account subject to defendant's check. The service of the garnishee summons upon Grant, Smith & Company was defective, but when the matter came before the court below there was a waiver of the defect by consent of the parties, and dis-

closure was then made to the effect that on the date of the attempted service the copartnership was indebted to defendant in an amount exceeding \$3,000.

Some question was raised on the argument in this court as to the waiver of the defect in the service, but the trial court expressly found such waiver by all the parties, and our examination of the record leads to the conclusion that the finding is fully supported by the facts there disclosed. So we pass that feature of the case without further comment.

Paul J. Kalman & Company, a copartnership, appeared in the action as interveners and by their complaint laid claim to the money on deposit in the garnishee bank in the name of defendant and subject to his check, and also to the indebtedness disclosed by the Grant, Smith & Company copartnership. Issue was joined on the claim so presented, and after due trial thereof the court, upon findings of fact made the basis of interveners' claim, as conclusions of law held that the claim was not valid as against plaintiff in the action, and judgment was ordered accordingly. Judgment was so entered and interveners appealed.

Interveners' claim to the money in the bank to the credit of defendant, and to the indebtedness due him from Grant, Smith & Company, is founded upon a contract with defendant the terms and provisions of which will be presently stated, which they insist vests in them: (1) A right to the money and the indebtedness similar to an equitable lien, superior to the rights or claims of the general creditors of defendant; and (2) that the contract vested in them a right to the money and indebtedness as parties jointly interested in the transaction out of which the same accrued. They also claim the indebtedness under and by virtue of an express assignment made by defendant and accepted by Grant, Smith & Company prior to the service of the garnishee summons herein. We dispose of the questions in the order stated.

1. The contention that the contract referred to gives rise to an equitable lien upon the funds in question in interveners' favor, or a right similar to such a lien, is not sustained. We find nothing in the contract taken as a whole to justify the conclusion of the creation of any relation between defendant and interveners, other than that of debtor and creditor, with the privilege on the part of interveners, as creditors, obviously to guard against a diversion or dissipation of the money advanced by

them, to supervise and in effect direct the expenditure of the money earned by defendant under the contract, as well as the funds so advanced. And it is clear that a relation of that character, though coupled with the supervisory right mentioned, can vest in interveners no legal or equitable personal claim to the funds arising out of the transaction.

The contract recites that defendant has secured or is about to secure contracts for laying the flooring in certain buildings under construction in the city of St. Paul, and, to enable him to carry out and perform the same, interveners undertook and agreed to advance all necessary funds for material and labor, not exceeding the sum of \$10,000. It was provided that of the money so advanced a certain sum should be used for the purchase of necessary machinery, and the balance, or so much thereof as might be necessary, to the payment exclusively of work, labor and material used in the particular contracts. Defendant agreed to devote his time to the performance of the contracts, and out of the money received therefor to pay himself the sum of \$200 per month, to be charged as a part of the expense of performance. All money advanced by interveners, together with that received by defendant on the contracts, was required to be deposited in his name in a bank satisfactory to the parties, to be drawn out on his check, countersigned by interveners. This method of withdrawing the funds from the bank was to continue until all advances were repaid to interveners, when defendant could withdraw the money by his individual check. The interveners reserved the right to keep the books of account in reference to the work, but it was expressly stipulated that such books should be the sole property of defendant and free of access to him. It was further agreed that, if defaults should be made in payments due on the contracts being performed by defendant, interveners were authorized "as the agents and representatives" of defendant to institute in his name all such actions or proceedings as might be necessary to enforce the same; and further, that if defendant found it necessary and he should in fact file liens against the property covered by the contracts he would on the completion thereof assign the same to interveners as further security for the payment of advances made by him, or "otherwise satisfactorily secure the said advancements." It was also agreed that defendant should not at any time "use or involve in any way the credit or name of the second parties (interveners), nor shall he at

any time attempt to represent them, as their agent, or in any manner obligate them by reason of said contracts or the work thereunder."

And further, that: "The second parties (interveners) shall in no wise be deemed obligated for the fulfillment in any wise of any of the terms of said contracts for the doing of the work heretofore mentioned."

It was lastly agreed that the net profits derived from the performance of the contracts should be divided equally between the parties, and the basis for arriving at or computing the same was stated and set forth. The amount interveners received by such division was made their compensation for the advances made to defendant, though the contract further provided that if they failed to advance the full amount agreed upon they should have no share in the profits, and only be entitled to a return of the amount actually advanced with interest at the rate of six per cent.

As heretofore stated,<sup>1</sup> we can find no basis from the terms and provisions of the contract which properly may be construed as vesting in interveners an equitable lien upon or other right to either the bank account or the Grant, Smith & Company indebtedness. The contract reserves no such right in express terms and none can be spelled out by necessary implication; there is no distinct or other appropriation of either to the payment of interveners' claim for advances. The whole scope and effect of the various stipulations of the contract by which interveners were given a supervisory control over the performance of the contracts to facilitate which the advances or loans were made, was in protection of their granted right to have the money so advanced devoted to the particular purpose, and not diverted to the performance of other contracts, in which interveners had no interest, or the personal uses of defendant. No language of the contract grants to interveners any other special interest in the funds, and, so long as they are used in connection with the particular contracts, the exclusive control thereof is vested in defendant. The conclusion therefore seems clear that the claim of equitable lien upon either of the funds must fail. 5 C. J. 909; Jones, Liens (3d Ed.) § 50 et seq.; Adams v. Citizens' Bank, 84 Fed. 270; Plymouth Cordage Co. v. Seymour, 67 Minn. 311, 69 N. W. 1079; Hillsdale Distillery Co. v. Briant, 129 Minn. 223, 152 N. W. 265; Christmas v. Russell, 14 Wall. (U. S.) 69, 20 L. ed. 762; Stearns v. Quincy Mut. Fire Ins. Co. 124 Mass. 61, 26 Am. Rep. 647.

<sup>1</sup>[Page 68.]

2. In our view of the case the only theory on which interveners may plausibly assert a claim to the specific fund, is that presented by their second contention, namely, that they were joint parties to the several contracts to promote which the advancements were made, therefore joint owners of the bank fund and also the Grant, Smith & Company indebtedness. But we are unable to sustain their contention in that respect. The express terms of the contract remove the case entirely from the rule of joint adventure or the copartnership relation. A joint adventure can arise only by contract or agreement between the parties to join their efforts in furtherance of a particular transaction or series of transactions. And in the absence of express limitations in that respect each party to such adventure is subject to all losses and liabilities, and entitled to share equally in the profits of the undertaking. The relationship is substantially that of a copartnership. The contract in question clearly creates no such relationship. The terms thereof expressly exclude interveners from all liability for the performance or failure to perform the contracts, and expressly declare that defendant shall have no authority to bind them by contract or otherwise in respect thereto. Interveners assume none of the burdens of performance, or the control thereof, other than such as they may deem necessary to prevent a wrongful diversion of the funds advanced, and for a breach of any of the contracts they would in no way be liable either jointly with defendant or otherwise. In short, the only interest interveners have in the contracts or the performance thereof is the stipulated share of the net profits. But that does not create a copartnership or a joint adventure. *T. R. Foley Co. v. McKinley*, 114 Minn. 271, 131 N. W. 316; *Richardson v. Hughitt*, 76 N. Y. 55, 32 Am. Rep. 267. They are entitled to a return of the money loaned or advanced, and stand to lose only in the event there shall be no net profits. The money advanced is not contributed to the enterprise, and must be repaid whether the venture is a success or a failure.

3. A short time prior to the commencement of the action, on the same day, defendant made a formal written assignment to interveners of the Grant, Smith & Company indebtedness, and before the service of the garnishee summons Grant, Smith & Company accepted the same by a written indorsement thereon. The assignment recited a consideration in



the usual form of "for value received," and on the face was a valid transfer of defendant's interest in the indebtedness. It was not, however, filed in the office of the city clerk, as required by G. S. 1913, § 7017, prior to the service of the garnishee summons, and the last question presented by interveners is whether a claim to the fund superior to the garnishment was thereby vested in them. We think the questions must be answered in the negative.

The statute cited, G. S. 1913, § 7017, provides that every assignment of a debt, unless the same be in writing and filed with the clerk of the town or municipality in which the assignor resides, shall be presumed to be fraudulent and void as against his creditors, unless those claiming thereunder make it appear that it was made in good faith and for a valuable consideration.

The facts are not in dispute. At the time of and for some time prior to the assignment plaintiff was a creditor of defendant, its claim being in the form of a judgment and the subject matter of this action. At the time of the assignment and acceptance of the Grant, Smith & Company, defendant was indebted to interveners in a sum exceeding \$20,000. But no evidence was offered to show the purpose of the assignment, either that it was in discharge pro tanto of that indebtedness, or that it had for its support any other valuable consideration. Nor was there any evidence that the assignment was made in good faith, or without purpose to defraud or delay creditors. The trial court found in this respect, after stating the facts as just recited, that "nothing appears as to the consideration for said instrument of assignment, nor does anything appear as to the purpose or intent of the parties in making said instrument." And the court held that the failure to file the assignment coupled with the lack of proof as to consideration and good faith, rendered the same void as to plaintiff.

The statute on this subject is clear, and declares that an assignment of the kind shall be presumed fraudulent as to creditors when not properly filed, unless the assignee shall make it appear that it was given for a valuable consideration and in good faith. On the facts of the case we are clear that the learned trial court was right in giving effect to this presumption of bad faith. The burden was upon interveners to overcome it. *Leonard v. Farrington*, 124 Minn. 160, 144 N. W. 763.

The conclusion that they failed in sustaining the burden is a necessary result from the evidence, unless we are to hold from the naked fact that at the time of the assignment defendant was indebted to interveners in an amount exceeding the debt assigned, that the trial court was bound to assume therefrom that the purpose of the parties was to discharge that debt to the extent of the amount of the assignment, or as security for its payment, and also was bound to assume that the transaction was in good faith and not colorable or for the purpose of preventing the creditors of defendant from reaching the assigned debt by garnishment or otherwise. But we are unable to hold that the statutory presumption of fraud may be overcome by inferences based upon that foundation. The formal recital in such an instrument of "value received," though as between the parties prima facie evidence of the passing of a valuable consideration, and a sufficient expression thereof to satisfy the statute of frauds, *D. M. Osborne & Co. v. Baker*, 34 Minn. 307, 25 N. W. 606, is not evidence against third persons in proof of a consideration in fact, or of the good faith of the assignment. *Watkins v. Edwards*, 23 Tex. 443, 448; *Kimball v. Fenner*, 12 N. H. 248; *Prescott v. Hayes*, 43 N. H. 593; *Nolen v. Gwyn*, 16 Ala. 725; *Hubbard v. Allen*, 59 Ala. 283; *Bolton v. Johns*, 5 Pa. 145, 151, 47 Am. Dec. 404; *Boone v. Chiles*, 10 Pet. 177, 9 L. ed. 388.

The conclusion, therefore, must be that interveners failed in sustaining the burden cast upon them by the statute. *Conroy v. Farree*, 68 Minn. 325, 71 N. W. 383; *Mattox v. Curtis*, 140 Minn. 506, 167 N. W. 424. The case of *Baylor v. Butterfass*, 82 Minn. 21, 84 N. W. 640, is not in point. The deficiency in the evidence here pointed out was supplied in that case. The consideration as well as the good faith of the transaction was disclosed.

Judgment affirmed.

ALBERT LAVALLE v. NORTHERN PACIFIC RAILWAY  
COMPANY.<sup>1</sup>

June 13, 1919.

No. 21,294.

**Railway — operation by Federal government — action for death or personal injury.**

The act of Congress of March 21, 1918, providing for the operation of transportation systems while under Federal control, provides that actions at law may be brought against carriers and judgment rendered "as now provided by law." Order number fifty (50) issued by the Director General of Railroads October 28, 1918, required that actions for death or injury to person growing out of the possession, control or operation of any railroad by the director general shall be brought against the director general and not otherwise. Insofar as such order prohibits the maintenance of such an action against the railroad company, it is in conflict with the act of Congress of March 21, 1918,<sup>2</sup> and is void.

Action in the district court for Washington county to recover \$15,000 damages for injuries received while a member of a section crew in defendant's employ. After the issuance of General Order No. 50, quoted in the opinion, defendant moved that the Director General of Railroads be substituted as defendant and that the action be dismissed as to the railroad company. The motion was granted, Searles, J. From the order dismissing the action against the Northern Pacific Railway Company and substituting William G. McAdoo, Director General of Railroads, as party defendant, plaintiff appealed. Reversed.

*John J. Keefe* and *T. D. Sheehan*, for appellant.

*Charles Donnelly* and *D. F. Lyons*, for respondent.

HALLAM, J.

On August 29, 1916, Congress enacted that:

"The president in time of war is empowered \* \* \* to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as

<sup>1</sup>Reported in 172 N. W. 918.

<sup>2</sup>[U. S. Comp. St. § 3115½j].

may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable" (39 St. 645, U. S. Comp. St. 1918, § 1974a).

By proclamation dated December 26, 1917, the President took over the transportation systems of the country and ordered that:

"All transportation systems covered by said proclamation and order shall be operated as a national system of transportation, the common and national needs being in all instances held paramount to any actual or supposed corporate advantage."

Relative to actions and legal proceedings, the proclamation said:

"Except with the prior written assent of said Director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may by general or special orders otherwise determine."

On March 21, 1918, Congress passed an act, "To provide for the operation of transportation systems while under Federal control." \* \* \* The act was declared to be "emergency legislation enacted to meet conditions growing out of the war" \* \* \* (Sec. 16). It recited that the President had "in time of war taken over the possession, use, control, and operation of certain railroads" (Sec. 1). It authorized the President to make all reasonable provisions not inconsistent with the acts of Congress "that he may deem necessary or proper for such Federal control" (Sec. 1), and, in addition to the powers expressly granted, gave to the President "such other and further powers necessary or appropriate to give effect to the powers and heretofore conferred" (Sec. 9), (40 St. 451, U. S. Comp. St. 1918, §§ 3115¾a, 3115¾p).

Section 10 provided:

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except insofar as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in

equity may be brought by or against such carrier and judgment rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. \* \* \* But no process, mesne or final, shall be levied against any property under Federal control" (40 St. 456, U. S. Comp. St. 1918, §§ 3115 $\frac{3}{4}$ a-3115 $\frac{3}{4}$ j).

On October 28, 1918, the director general issued General Order Number 50 which recited that:

"Since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control should be brought directly against the said Director General of Railroads and not against said corporation." And ordered "that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties and forfeitures." As to pending suits, the order provided that "the pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom."

This action was brought in September, 1918. After the issuance of Order Number 50, defendant moved that the Director General of Rail-

roads be substituted as defendant and that the action be dismissed as to the railroad company. The trial court granted the motion. Plaintiff appeals.

The assumption of Federal control was, in effect, a mobilization under one head of the persons and corporations engaged in the business of transportation as a means of meeting the emergencies imposed by a state of war. *Vaughn v. State* (Ala.) 81 South. 417. Viewed in this light, the assumption of control was without doubt within the power granted by the Constitution to the Federal government and was an appropriate instrumentality for carrying into effect the known powers of the government. *Wainwright v. Pennsylvania R. Co.* 253 Fed. 459; *Knox v. Lee*, 79 U. S. [12 Wall.] 457, 539, 20 L. ed. 287. We do not question the power of Congress to enact the laws above recited, nor the power of the President, directly or through the director general, to issue the orders he has issued, if not inhibited by congressional legislation.

It seems clear, however, that if the act of Congress and an order of the director general are in conflict the act of Congress must prevail. A majority of the court are of the opinion that section 10 of the act of March 21, 1918, gives to one having a cause of action arising out of the operation of a railroad while under Federal control the right to sue the railroad company thereon, and that Order Number 50 insofar as it denied to a plaintiff the right to pursue the railroad company was beyond the power of the director general and was void.

Order reversed.

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STATE EX REL. CLIFFORD L. HILTON v. PROBATE COURT  
OF KANDIYOHI COUNTY AND ANOTHER.<sup>1</sup>

June 13, 1919.

No. 21,321.

**Inheritance tax when beneficiaries agree to settle will contest.**

The statute imposes a tax on any transfer of property "by will or intestate law."<sup>2</sup> Where a will contest has been amicably settled between the beneficiaries named in the will, and they have in good faith stipu-

<sup>1</sup>Reported in 172 N. W. 902.

<sup>2</sup>[G. S. 1913, § 2271.]

lated for a decree of distribution in accordance with the settlement, and there is no intent to evade or reduce the inheritance tax, the tax should be computed upon the share received by each beneficiary under the decree.

Upon the relation of Clifford L. Hilton, Attorney General, the supreme court granted its writ of certiorari directed to the probate court of Kandiyohi county and the Honorable T. O. Gilbert, judge thereof, to review the judgment of that court in the matter of inheritance tax upon the estate of Catherine McIntyre, deceased. Affirmed.

*Clifford L. Hilton*, Attorney General, and *Egbert S. Oakley*, Assistant Attorney General, for relator.

*R. W. Stanford*, for respondents.

HOLT, J.

By writ of certiorari sued out by the attorney general, the judgment of the probate court of Kandiyohi county determining the amount of inheritance tax due the state from the estate of Catherine McIntyre, deceased, is brought before this court for review.

The decedent, a resident of the state of Iowa, left a will, whereby she gave one-third of all her property to her husband, Daniel McIntyre, and the remaining two-thirds thereof to a trustee in trust to pay to her niece, Kate Walsh, the income therefrom and a sufficient amount of the principal to support her comfortably, and at her death to deliver the remaining principal to her heirs. The will was duly admitted to probate in the proper court of the state of Iowa on November 5, 1914, and was duly admitted to probate in this state as a foreign will by the probate court of Kandiyohi county on August 16, 1915. An agreement executed by and between the husband, Daniel McIntyre, and the niece, Kate Walsh, on September 25, 1915, was filed in the probate court of Kandiyohi county on October 14, 1918. This agreement states that it was made to confirm a prior oral agreement between the parties; that, when the will was offered for probate in the Iowa court, Daniel McIntyre filed objections thereto; that to avoid a contest Daniel McIntyre and Kate Walsh made an oral agreement that the objection should be withdrawn and the will admitted to probate, and that the property left by the decedent should be divided equally between them; that the objections

were withdrawn and the will was admitted to probate; that by reason of the facts recited in the agreement Daniel McIntyre is entitled to an undivided one-half of the property of the decedent, and the trustee is entitled to the other undivided one-half thereof for the purposes of the trust, and that both parties to the agreement desired the court to assign the property in accordance therewith in its final decree. The husband and the niece were the only parties to this agreement, but the power of the niece to bind the trust estate thereby does not seem to have been questioned by anyone at any time, and for the purposes of this case we shall assume, without further consideration, that the agreement was valid and effective.

The property within this state consisted of a tract of land in Kandiyohi county of the value of \$4,800. It is stipulated that this land was sold for the sum of \$4,800 on October 10, 1918, and that the expenses of administration in the sum of \$197.50 were paid from the proceeds, and that the remaining sum of \$4,602.50 was assigned in equal shares to Daniel McIntyre and Kate Walsh, pursuant to the above agreement, by the final decree of the probate court made on December 23, 1918.

Where property passes to a surviving spouse \$10,000 in value is exempt from the inheritance tax; where it passes to a niece \$1,000 in value is exempt from such tax. It is conceded that no tax is due from the husband whether he received one-third or one-half of the property, as in either event he received less than the amount of his exemption. By virtue of the agreement, the trustee retained for the purposes of the trust only one-half of the property of the value of \$2,301.25. The court deducted the exemption of \$1,000 from this amount and held that the remaining sum of \$1,301.25 was the only amount subject to the transfer tax and rendered judgment accordingly. The state contends that two-thirds of the property of the value of \$3,068.33 passed to the trustee by the will, of which \$1,000 was exempt and \$2,068.33 was subject to the tax.

The question presented is whether, where there is a purported will, the several beneficiaries therein shall pay the inheritance tax upon the amount actually received out of the estate according to a decree of distribution entered upon a good faith compromise between them, or should they each pay upon the portion designated as the share in the will?



The fundamental principle in the whole inheritance tax law is to exact a tax upon the clear amount in money value received by each beneficiary, legatee or heir from a decedent's estate, by virtue of the provisions of a will, or the intestate law, or otherwise, for the tax reaches transfers made by a decedent in contemplation of death. The tax is upon the transfers by which a beneficiary, legatee or heir obtains a portion. It is not a tax upon the estate, but upon the privilege of receiving a portion thereof, and is to be computed on the clear value of the portion received. True, theoretically the transfer occurs upon the death of decedent, when it is accomplished either by will or the intestate law. And the act provides that the basis of computing the tax shall be upon the money value of the portion received as of the time of decedent's death, or as soon thereafter as it is practicable to ascertain its then true value. The intention of the act is to compute the tax upon the value of the property which is received by an heir, or legatee, out of a decedent's estate, and upon nothing else. While the law provides against evasions it also carefully guards the rights of the one from whom the tax is exacted by providing for a refund under certain conditions. It tolerates neither evasions nor injustice nor inequalities. The law does not in terms provide that the tax shall be computed upon the will as written. The intent no doubt is to compute upon the portion received by each legatee or beneficiary.

Where a decedent has attempted to transfer his estate by a purported will, there is frequently an uncertainty as to the persons who eventually will participate in the estate, and the amount or value of the portion to be received, and there is also a possibility that the transfer may after all be in virtue of the intestate law and not through the will. The will may turn out not properly executed, or invalid because of lack of testamentary capacity or the exertion of undue influence. Therefore, in case of a contest between the beneficiaries named in the will, or where the instrument is attacked by one claiming under the intestate law, the practical proposition is that there is no actual transfer of any portion of the estate until the final decree of distribution is made, or until a court of competent jurisdiction construes or determines the issue between the claimants. The decree so finally entered relates back, and, of course, makes the transfer effectual as of the date of death. But so

far as concerns the state's right to charge inheritance tax against a transferee for an amount received, the decree must be deemed conclusive, unless entered collusively for the purpose of evading or diminishing the tax. The final determination of the courts speaks with authority concerning the transfer, the transferee, and the portion transferred. And the inheritance tax law no doubt intended that, where there was uncertainty or a contest, the tax should be computed according to the final adjudication between the parties. A contest may be tried out, but it may also be compromised. A final judgment or decree after a trial is no more effective or binding upon the parties than one entered pursuant to a compromise. In this case there was a valid compromise and a decree of distribution agreed upon. In *re Rogers' Estate*, 141 Minn. 93, 169 N. W. 477. No person can question the efficacy of this decree to formally transfer to each of the parties the portion of the estate which passed to each at decedent's death, and the state should not be permitted to so do except upon a showing that it was collusively entered for the purpose of depriving the state of the proper tax. The policy of the state should be to encourage settlement of litigation. In the instant case had the contest resulted in favor of the husband, there would have been no tax at all, because of the exemption allowed a spouse.

Another principle may be applied to the facts of the instant case. A beneficiary in a will may refuse to accept the portion given.

In *Wolfe's Estate*, 89 App. Div. 349, 85 N. Y. Supp. 949 (affirmed in 179 N. Y. 599, 72 N. E. 1152, upon the opinion below, and approved but distinguished in *Matter of Cook*, 187 N. Y. 253, 79 N. E. 991), it is said: "If the legatee renounce the gift and refuse to receive it, no tax can be collected with respect to him, because there has been no transfer to him. His right to renounce the privilege of accepting the donation is not denied or forbidden by the statute, and such right is recognized by the authorities, or some of them, which I have cited. On his effective renunciation the title to or ownership of the property of the gift remains in the estate, to be disposed of under the terms of the will, and the succession is taxable in accordance with the nature of the ultimate devolution. The fact that the tax is payable at the death of the testator controls the question of interest, but certainly controls no other question germane to the point now under consideration. There need be

no reasonable apprehension that the state government will be seriously embarrassed by renunciations of legacies made in evasion of the law." The Iowa court approved the principle stated in *Stone's Estate*, 132 Iowa, 136, 109 N. W. 455, 10 Ann. Cas. 1033, where the syllabus<sup>1</sup> reads: "A contract between the beneficiaries in a will, including a collateral legatee, renouncing the provisions of the will and providing for a division of the property, was valid and enforceable, though its effect was to deprive the state of a collateral inheritance tax, otherwise assessable on the legacy to the collateral legatee." Logically it would seem to follow that if a beneficiary may renounce the whole legacy he may renounce a part, and the part so renounced is not subject to the succession tax as property transferred to him by the will.

By the compromise, in the case at bar, the niece in fact renounced a part in favor of testatrix's husband, the only other legatee and the sole heir. Whether the final decree stipulated for is considered as adjudicating a partial renouncement of the legacy by the niece, or as a construction of the will, even though erroneous, it is conclusive upon all interested in the estate that, by the will, the estate passed in equal shares to the two legatees. In line with the view that the portion surrendered by the niece under the settlement is not subject to a tax, except as a transfer of that much by will to the husband of testatrix, may be cited *People v. Rice*, 40 Colo. 508, 91 Pac. 33. In *Pepper's Estate*, 159 Pa. St. 508, 28 Atl. 353, and *Hawley's Estate*, 214 Pa. St. 525, 63 Atl. 1021, 6 Ann. Cas. 572, it was held that money paid out of an estate in good faith compromise of a threatened will contest, is not subject to inheritance tax; that the only effect of such settlement was to reduce the estate that passed by the will and make the tax applicable to what remained for distribution. It is unnecessary to determine now, whether in such a case the state ought not to be able to secure the tax upon the part received by the party who accepted part of the estate by the settlement.

The decisions notably opposed to the view that a settlement of a will contest can change the tax from that computed under the terms of the will as written are: *Baxter v. Treasurer and Receiver General*, 209 Mass. 459, 95 N. E. 854; *Matter of Cook*, 187 N. Y. 253, 79 N. E. 991; and *Estate of Graves*, 242 Ill. 212, 89 N. E. 978. In *Baxter v. Treas-*

<sup>1</sup>[See 109 N. W. 455.]

urer and Receiver General the court lays some stress on the fact that for many years there had been a statute in force providing for compromise agreements in relation to will controversies, with the approval of the probate court, and it was thought that in view of that statute the inheritance tax was not intended to be subjected to the uncertainties that might result from such compromises, but should be computed under the will as written.

The reasoning in the Illinois and New York cases cited is that, where there is a compromise and settlement in a will controversy, the transfer is by the contract of settlement and not by the will, that the one who acquires more than the will in terms gives, acquires that part by purchase or assignment, and therefore the succession tax must be based upon the will as written. It is to be noted that in both cases there was no stipulation for a final decree of distribution, as in the case at bar, and there was an outright sale and assignment of the claimant's interest in the estate for a large money consideration. Where there is an outright purchase and assignment of a beneficiary's interest in an estate, it is but right that the tax which it was subject to in the hands of the assignor should be paid. But it would seem that a good faith compromise by which the whole estate is divided between the beneficiaries in the will in a different manner than therein stated, and upon no other consideration than the settlement of a bona fide contest, is not properly an assignment of any interest in the estate, and it should be accepted by the state as a proper basis for the computation of the inheritance tax, it not appearing that the compromise was made for the purpose of evading the tax.

The judgment should be affirmed.

DIBELL, J. (dissenting).

I dissent. The precise question is whether the provisions of the probated will under which the devisees took, or the provisions of their contract, made, as it recites, "in order to save the expenses of a contest as to the admission of said will to probate and for the purpose of making a more just and equitable division of the property belonging to said estate," the decree of distribution of the proceeds of the sale of the real estate passing it to the two devisees in proportions different from those

provided by the will but in accordance with the consent and request embodied in the contract, fix the status of the property for the determination of the transfer tax. In my opinion the will, not the contract, is the basis for computing the succession tax.

By the statute, so far as applicable here, a succession tax is imposed "when the transfer is by will or by intestate law, of property within the state." G. S. 1913, § 2271. The tax takes effect "at and upon the death of the person from whom the transfer is made," and it is a lien upon the property transferred. G. S. 1913, §§ 2273, 2276. The statute makes it as plain as language can that there is to be a tax when there is a transfer by will or by intestate law.

The land which the testatrix owned in Minnesota passed at her death by her will or by the intestate laws of the state. There was a will admitted to probate and therefore it passed by will. It could pass in no other way and in no other proportions than the will stated. By this will her husband got one-third and her niece got two-thirds. By the contract between them the husband got one-half and the niece one-half of all that passed by the will; or, putting it in another way, the niece, to effect this result, gave the husband, who had received one-third by will, one-fourth of the two-thirds which she took by the same will, which was the equivalent of one-sixth of the whole, so that by the contract and the will each had a one-half. They did not think to change the will nor could they change it any more than they could change the law of descent. The husband did not get more than a third by will; the niece took no less than two-thirds by will. It is likely true that the niece might have renounced the gift which came to her by the will. She did not. She preferred taking it. Whether she could have renounced one-fourth of her two-thirds is a question not important here. Upon these interests, as they come by will, the statute in express terms imposes a succession tax. Those taking by will cannot change or escape the tax which the statute imposes, no matter how good their motive, by partitioning among themselves what they get, whether such partition operates favorably to themselves or advantageously to the state. This is the view taken in *Massachusetts*, *New York*, *Illinois*, *Iowa*, *Nebraska*, *California* and *Tennessee*. *Baxter v. Treasurer and Receiver General*, 209 Mass. 459, 95 N. E. 854; *Matter of Cook*, 187 N. Y. 253, 79 N. E. 991; *Estate of*

Graves, 242 Ill. 212, 89 N. E. 978; In re Wells' Estate, 142 Iowa, 255, 120 N. W. 713; In re Sanford's Estate, 90 Neb. 410, 133 N. W. 870, 45 L.R.A.(N.S.) 228; Estate of Rossi, 169 Cal. 148, 146 Pac. 430; English v. Crenshaw, 120 Tenn. 531, 110 S. W. 210, 17 L.R.A.(N. S.) 753, 127 Am. St. 1025. Other cases might be cited from the same states. The courts of Pennsylvania and Colorado take a different view. Pepper's Estate, 159 Pa. St. 508, 28 Atl. 353; People v. Rice, 40 Colo. 508, 91 Pac. 33.

It cannot be successfully urged that the cases from the seven states first named are substantially distinguishable from the case at bar, or that they can be brought into harmony with the majority opinion. The cases themselves, or others from the same jurisdiction, concede that they are at war with the Pennsylvania doctrine and the doctrine now adopted by this court. Nor can it be contended but that Pennsylvania and Colorado are in harmony with the majority opinion.

In the New York case the court said: "The compromise did not change the will. No settlement could change a word that the testator wrote. The will stands as it was written, and the most solemn instrument, executed by all parties interested, could not convert a bequest to the nephews and nieces into a bequest to the widow. As we said in another case, she takes under them 'by contract, not under the will or from the testator.' A succession tax is measured by the legal relation which the legatee bears to the testator and is not affected by the relation which an assignee of the legatee bears to him."

In the Illinois case the court, speaking of one who had received money in compromise of a threat to contest, said: "No beneficial interest passed to her under any statute. The money was paid to her by virtue of a contract with the heirs. Henry Graves died testate. His will disposed of all his estate. The whole of the residuary estate vested, at the instant of his death, in the residuary legatees. The inheritance tax was then due and payable. \* \* \* Subsequent events did not affect it." Language like that quoted is typical of that found in other cases.

The fact that the probate court made a decree of distribution giving one-half of the proceeds of the sale of the land to the husband and one-half to the niece, as they formally requested in their contract, is not important in the present controversy. Conceding that it had jurisdic-

tion to decree in accordance with a contract between them and contrary to the will, a decree to such effect does not determine the state's right to a succession tax. That the jurisdiction of the probate court does not extend to controversies between beneficiaries and others is well understood. *State v. Probate Court of Sibley County*, 33 Minn. 94, 22 N. W. 10; *Farnham v. Thompson*, 34 Minn. 330, 26 N. W. 9, 57 Am. Rep. 59; *Hurley v. Hamilton*, 37 Minn. 160, 33 N. W. 912; *Odenbreit v. Utheim*, 131 Minn. 56, 154 N. W. 741, L.R.A. 1916D, 421, and cases cited. It is well settled that a probate decree cannot be attacked collaterally. *Davis v. Hudson*, 29 Minn. 27, 11 N. W. 136. The decree of distribution, made not in conformity to the will but in accordance with the request of the parties embodied in the contract, does not conclude the state in its claim of a succession tax. It is not interested in it. It is not attacking the decree of distribution collaterally or at all. It is not concerned with the contract which the devisees made relative to the property which they took under the will, nor complaining of it. Under the sections of the statute before cited a succession tax takes effect upon the death of the testator and it is a lien upon the property devised. The state is assailing the determination by the probate court of the amount of the tax to be paid. This it has the statutory right to do and it is not concluded by the decree of distribution. If the probate court in its final decree had construed the will as giving the property to the devisees in equal shares it might be argued that such construction was conclusive here, but the court did nothing of the kind and a contention to that effect was not before it. It established as valid the provisions of the will and it distributed the estate on a basis of one-half and one-half in obedience to the statement in the contract that "both parties to this agreement hereby consent and ask that a decree of final distribution be entered assigning and distributing" the estate in the proportions stated.

In the Massachusetts case, the court referring to its statute which allows a compromise of will contests which is made a part of the decree of probate, and in holding the estate subject to a succession tax in accordance with the terms of the will, said: "In view of the nature and office of the compromise statute, and of the language of the tax statute, the most reasonable interpretation of the phrase 'which shall pass by will' in the tax statute is that it describes only property that passes by the terms

of the will as written and not as changed by any agreement for compromise made within or without the statute. Any other interpretation would make the amount to be assessed hinge on the manner in which the agreement was to be carried out. In the case before us there can be no doubt if the will had been admitted to probate without a record of the agreement the tax would have been assessed in accordance with the terms of the will, although the agreement as to the division of the estate would have been perfectly valid. For reasons hereinbefore stated the amount of the tax is not changed by the fact that the agreement was approved by the court and made a part of the decree."

The settlement of controversies over estates is not to be discouraged. The statute however cannot be changed to encourage settlements, nor is it apparent that the doctrine of the seven states particularly discourages settlements any more than that the Pennsylvania doctrine encourages them. Certainly the case before us illustrates no practical discouragement. The niece was willing to part with \$800 in settlement. The succession tax which she is contesting is \$24. The parties may make such a settlement as they wish, but if they take title by the will they cannot settle in disregard of the statute which imposes a succession tax upon the gifts to them. The statute embarrasses them only when they seek to avoid the succession tax.

In the administration of our inheritance tax law it may be said, as the Massachusetts court said relative to its own tax law: "It is important that in the assessment of this tax there should be a plain, simple rule. The property upon which the tax is to be assessed is that which passes by will or by the laws regulating intestate succession. When there is a will \* \* \* whatever does pass by it passes to the legatees therein named, and by force of the will passes to no other person."

Justice Hallam concurs in the dissent.



STATE v. PETER W. REMPEL AND ANOTHER.

PETER W. REMPEL, APPELLANT.

SAME v. SAME.

JOHN REMPEL, APPELLANT.<sup>1</sup>

June 20, 1919.

Nos. 21,207, 21,208.

**Assault and battery — evidence.**

Evidence that during an affray one of defendants started to draw a revolver from his pocket, but did not point it toward anyone or make any movement to use it against anyone, is not sufficient to sustain a conviction of an assault with a weapon likely to produce grievous bodily harm.

Defendants were indicted by the grand jury of Watonwan county charged with the crime of assault in the second degree, tried in the district court for that county before Comstock, J., and a jury which returned verdicts of guilty as charged in the indictment. From the judgment sentencing each defendant to a fine of \$1,000 and in default thereof to imprisonment in the county jail of Blue Earth county until payment be made, not to exceed one year, defendants appealed. Reversed.

*C. J. Laurisch*, for appellants.

*Clifford L. Hilton*, Attorney General, *James E. Markham*, Assistant Attorney General, and *J. L. Lobben*, County Attorney, for respondent.

TAYLOR, C.

Defendants were convicted of an assault in the second degree and appealed from the judgment.

The indictment charges that the defendants "did wrongfully, unlawfully, wilfully and feloniously assault T. P. Trowbridge with a loaded revolver, a weapon likely to produce grievous bodily harm."

Trowbridge and one H. H. Klein were guests at the hotel in the village of Butterfield in Watonwan county on Sunday, July 21, 1918. The

<sup>1</sup>Reported in 172 N. W. 920.

residence of the defendant Peter Rempel is on the lot adjoining the hotel. While Trowbridge and Klein were at breakfast Sunday morning, they overheard the conversation between defendant Peter Rempel and one Bernhard Rempel, who were seated on a bench on the lawn some 10 or 15 feet from the open dining-room window. Trowbridge called to them through the open window to cut out their pro-German talk, which was followed by further remarks back and forth. The testimony concerning what took place later is radically conflicting in many respects, but the jury having found the defendants guilty, we must take the testimony of the witnesses for the prosecution as correctly stating the facts.

About noon, while Trowbridge and Klein were seated in the hotel office waiting for the dining room to open, defendant Peter Rempel entered the office and stepping up to Trowbridge asked: "Did you say I was a pro-German?" To which Trowbridge answered: "I didn't say you were a pro-German; I asked you to cut out your pro-German talk or move." After some further words had passed between them Klein spoke up and said: "Judging from the conversation that I overheard this morning, you are a pro-German." At this Peter applied vile and opprobrious epithets to Klein, struck at him, was struck by Klein and they clinched. About this time defendant John Rempel entered the room and started to help Peter. Trowbridge caught John in such a manner as to lock his arms behind his back, pushed him against the counter and held him there. John had a revolver in his hip pocket, which he says he had carried for several weeks, and this is not contradicted. While Trowbridge was holding him against the counter, John tried to get this revolver, but Trowbridge prevented him from doing so. About this time a stranger separated Peter and Klein, and Peter started for Trowbridge, who released John to meet Peter's attack. On being released, John grasped his revolver and drew it partly out of his pocket, but was seized by Klein, and, after a short struggle for possession of the revolver, Klein told him to put it back in his pocket and he did so. One or two further attempts to draw the revolver were also stopped by Klein. The parties then quieted down and the defendants left.

The defendants both emphatically deny that John ever made any attempt to draw his revolver. During the affray, the defendants used vile language and made vicious threats. Were it not for these threats, it

would hardly be claimed that they had made an assault with a dangerous weapon. No claim is made that John made any move to draw his revolver until after he had been seized by Trowbridge, and was being held in such a manner that he could not use his hands or arms. Unable to do anything else, he tried to reach his weapon. When released, he started to draw it from his pocket, but no one claims that he pointed it toward any one, or made any movement to use it against Trowbridge or anyone else. The testimony of Klein and Trowbridge, the only witnesses who testify that he attempted to draw the revolver, does not show that he ever had it entirely out of his pocket, and it was put back in his pocket and remained there. If he had pointed the revolver toward Trowbridge or made a movement to use it against Trowbridge, this might be an act which would constitute an assault with it, but the evidence goes no further than to show that he made an attempt to draw it without getting it out where he could use it.

While the evidence would sustain a conviction of an assault in the third degree, we are of opinion that it does not justify a conviction of an assault in the second degree. 2 Bishop, Crim. Law, § 31; Tarpley v. People, 42 Ill. 340; Tarver v. State, 43 Ala. 354; Flournoy v. State, 25 Tex. App. 244, 7 S. W. 865; State v. Godfrey, 17 Ore. 300, 20 Pac. 625, 11 Am. St. 830; Penny v. State, 114 Ga. 77, 39 S. E. 871, 13 Am. Cr. 77.

Both convictions are reversed.

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## ANNIE FERRIS v. MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY.<sup>1</sup>

June 20, 1919.

No. 21,209.

**Carrier — personal baggage — when liable for merchandise.**

1. Baggage means such articles of necessity and convenience as are usually carried by passengers for their personal use. It does not include merchandise held for sale, but, if the carrier knowingly accepts such

<sup>1</sup>Reported in 173 N. W. 178.

merchandise as baggage, its liability is the same as in case of other baggage. In this case the evidence sustains the finding of the jury that certain articles of merchandise kept for sale were accepted as baggage with notice of their character and use.

**Same — limitation of liability of carrier for loss.**

2. The limitation of the amount of the carrier's liability for loss is a matter of contract. A limitation in a schedule of rates published and filed as required by statute is not effective for the purpose if not assented to by the shipper.

**Same.**

3. A limitation on the baggage check does not limit the carrier's liability, unless assented to by the passenger, and there is a contract fairly and honestly entered into establishing the limitation.

**Same — burden of proof on carrier.**

4. The burden of proof is upon the carrier to prove that such a contract was fairly and honestly made.

Action in the municipal court of Waseca to recover \$455 damages for lost baggage. The answer alleged that the tariff under which defendant operated its railroad contained a provision that unless a greater sum is declared by the passenger and charges paid for increased valuation at time of delivery to carrier, the value of baggage belonging to or checked for an adult passenger should be deemed and agreed to be not in excess of one hundred dollars; that the value of the personal baggage delivered by plaintiff to defendant did not exceed \$20; that plaintiff did not at the time of procuring the checking of her grip or at any time declare the value of the baggage, and plaintiff did not pay defendant any sum whatever for transportation of her baggage. The case was tried before Childress, J., and a jury which returned a verdict for \$420. From an order granting its motion for a new trial, plaintiff appealed. Reversed with directions to enter judgment on the verdict.

*Moonan & Moonan*, for appellant.

*R. B. Alberson, W. C. Odell and M. M. Joyce*, for respondent.

**HALLAM, J.**

Plaintiff was a peddler traveling about selling various articles of mer-

chandise. In November, 1917, plaintiff bought a ticket from Montgomery to Waterville on defendant's line and at the same time presented a grip, containing personal apparel and also certain articles which she had for sale, to defendant's agent and asked that the grip be checked to Waterville. The agent checked the grip and it was lost in transit. Defendant admitted liability. The questions litigated were: First, was defendant liable for the value of the merchandise; and, second, was there an effective limitation of the amount of liability.

Plaintiff had a verdict for \$420, the value of the contents of the grip. The court granted a new trial exclusively upon errors occurring at the trial.

1. By the term baggage is meant such articles of necessity or personal convenience as are usually carried by passengers for their personal use. It does not include merchandise kept for sale. Story, *Bailments*, § 499; 10 C. J. 1187; *Haines v. Chicago, St. P., M. & O. Ry. Co.* 29 Minn. 160, 12 N. W. 447, 43 Am. Rep. 199. If, however, the carrier knowingly accepts as baggage a package containing ordinary merchandise, it waives any objection to the character of the property and its liability is the same as in case of ordinary baggage. 10 C. J. 1195; *McKibbin v. Great Northern Ry. Co.* 78 Minn. 232, 80 N. W. 1052. Defendant's regulations permit the carriage of sample goods as baggage. Plaintiff, in the presence of defendant's agent and before the grip had been checked, opened the grip to take out certain articles. The agent plainly saw that part of the contents of the grip consisted, not of personal apparel, but of merchandise such as is usually kept for sale. Plaintiff had been in the same business for ten years and had frequently checked this grip at Montgomery. With this evidence in the case, the court instructed the jury that, if the nature of the contents of the grip and the use the plaintiff proposed to make of them were known to defendant's agent at the time he accepted the grip as baggage and issued a baggage check therefor, defendant was liable for the full value of the contents of the grip. This instruction was correct. The jury by their verdict found that defendant's agent had such knowledge and the evidence sustains the findings.

2. Defendant contends that its liability is limited to \$100. It contends that it has published and filed with the Railroad and Warehouse

Commission a schedule of rates which contains this language: "Unless a greater sum is declared by the passenger and charges paid for increased valuation at time of delivery to carrier, the value of baggage up to and including 150 pounds \* \* \* shall be deemed and agreed to be not in excess of \$100." We will assume that the evidence establishes this fact.

Our statutes require every railroad company to publish and file with the Railroad and Warehouse Commission schedules of rates, fares and charges for transportation of persons and property, and provide that such schedules shall state "any rules or regulations in any way affecting the aggregate of such rates, fares and charges," G. S. 1913, §§ 4342, 4344, and they prohibit "any unequal or unreasonable preference or advantage to any particular person." Section 4332. Defendant contends that the passenger is conclusively presumed to have knowledge of any limitation of liability in the schedules and regulations filed, and that such limitation fixes the amount of recovery in case of loss. This was substantially the rule applied by the United States Supreme Court in construing the Hepburn Act of June 29, 1906, the provisions of which are, in the particulars mentioned, much the same as ours, except that they refer to interstate commerce whereas ours refer to intrastate commerce. *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. ed. 314, 44 L.R.A.(N.S.) 257; *Great Northern Ry. Co. v. O'Connor*, 232 U. S. 508, 34 Sup. Ct. 380, 58 L. ed. 703; *Boston & Maine R. R. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. ed. 868, L.R.A. 1915B, 450, Ann. Cas. 1915D, 593.

The court held in those cases that under the Hepburn Act the limitation of liability stated in the schedules is part of the rate; that where a tariff rate is based on value it fixes the rights and liabilities of the parties; that, if no value is stated, the tariff rates applicable to such a state of facts applies; that, if there are alternative rates based on value and the shipper accepts the lower rate, the carrier, if sued for loss, is liable only for the lower value. As to baggage cases that court held that a provision in a tariff schedule that the passenger must declare the value of his baggage and pay stated excess charges for excess liability is a "regulation" of which the shipper is bound to take notice, and that the effect of the regulation and the delivery and acceptance of the baggage

without declaration of value or notice to the carrier of such higher value is to charge the carrier with the maximum liability stated in the schedules.

Defendant urges us to follow the rule of these Federal decisions. With all due respect to that high authority, we are not disposed now to do so. The sections of our statutes above cited were originally enacted in 1887. Laws 1887, p. 53, c. 10, § 8, subds. a and b, and section 5. They have come down with little change. This court many years ago held that the limitation of the carrier's liability is matter of contract. *Alair v. Northern Pacific R. Co.* 53 Minn. 160, 54 N. W. 1072, 19 L.R. A. 764, 39 Am. St. 588; *O'Malley v. Great Northern Ry. Co.* 86 Minn. 380, 90 N. W. 974; *Ostroot v. Northern Pacific Ry. Co.* 111 Minn. 504, 127 N. W. 177; *O'Connor v. Great Northern Ry. Co.* 120 Minn. 359, 139 N. W. 618; *O'Connor v. Great Northern Ry. Co.* 118 Minn. 223, 136 N. W. 743; *McGrath v. Northern Pacific Ry. Co.* 121 Minn. 258, 141 N. W. 164, L. R. A. 1915D, 644.

Defendant contends that since section 4342 of our statutes was re-enacted in 1907, chapter 377, p. 534, Laws 1907, after the passage of the Hepburn Act, our legislature must have intended to adopt the construction given the Hepburn Act by the Federal Supreme Court. This contention we do not sustain. The purpose of incorporating this section in the act of 1907 was plainly to amend it in a particular not material here.

It may be proper to observe that the rule of the Federal cases cited has been substantially modified by acts of Congress. U. S. Comp. St. 1916, § 8604a.

Our own judgment is that the rule of our own decisions is the correct one and we are not impelled at this time to abandon it.

3. Defendant contends that there was a limitation of its liability by contract. On the baggage check was printed this language: "Liability is limited to \$100 \* \* \* unless a greater value is declared by owner at time of checking and payment is made therefor." The claim of a contract is based upon these words printed on the baggage check. The baggage check is not ordinarily a contract of carriage. It is merely a receipt. 10 C. J. 1199; *Isaacson v. New York Central & H. R. R. Co.* 94 N. Y. 278, 286, 46 Am. Rep. 142. It is well settled by decisions of

this court that such language on a baggage check does not operate to limit the carrier's liability, unless the passenger in fact consented to the limitation and there was a contract fairly and honestly entered into between the parties establishing the limitation of liability. See *Ford v. Chicago, R. I. & Pac. Ry. Co.* 123 Minn. 87, 90, 143 N. W. 249. There is no evidence of any real negotiation in this case, no evidence in fact that the limitation ever came to the attention of plaintiff.

4. The trial court charged the jury that the burden of proof was upon the defendant to establish the fact that there was an agreement expressed or implied, fairly and honestly entered into limiting defendant's liability. The trial court later conceived that this was error and from the memorandum filed it appears that he granted a new trial on this ground. In our opinion the instruction was right and the order granting a new trial was error. Our decisions are not quite explicit as to the burden of proof in such cases. It is held, however, that contracts limiting liability are effective only "when it is made to appear that they are just and reasonable." *Ostroot v. Northern Pacific Ry. Co.* 111 Minn. 504, 127 N. W. 177; *Murphy v. Wells-Fargo & Co. Express*, 99 Minn. 230, 108 N. W. 1070. We think the rule properly deducible from our decisions is that contracts limiting liability are in derogation of the common law and are not favored, that the burden is on the carrier to show that there was a stipulation effective for that purpose, that is to prove not merely a contract in form but a contract made understandingly. This is the generally accepted rule. 4 R. C. L. 920; *Wabash R. Co. v. Thomas*, 222 Ill. 337, 78 N. E. 777, 7 L.R.A.(N. S.) 1041; *Houtz v. Union Pac. R. Co.* 33 Utah, 175, 93 Pac. 439, 17 L.R.A.(N.S.) 628; *Toledo St. L. & W. R. Co. v. Milner*, 62 Ind. App. 208, 110 N. E. 756; *Cleveland, C. C. & St. L. R. Co. v. Patton*, 203 Ill. 376, 67 N. E. 804; *Grice v. Oregon-Washington R. & Navigation Co.* 78 Ore. 17, 150 Pac. 862, 152 Pac. 509, Ann. Cas. 1917E, 645; *Rosenfeld v. Peoria, D. & E. Ry. Co.* 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500. We conclude that the charge was right and that it was error to grant a new trial.

Order reversed with directions to enter judgment on the verdict.



AMERICAN BRICK & TILE COMPANY v. CHARLES TURNELL  
AND OTHERS.

EQUITABLE SURETY COMPANY, APPELLANT.<sup>1</sup>

June 20, 1919.

No. 21,218.

**Commerce — action by foreign corporation.**

1. A foreign corporation, not licensed to do business in this state may maintain an action in the courts of this state to enforce payment for goods sold in interstate commerce to residents of this state.

**Same — sale of goods delivered in Minnesota.**

2. A sale of tile to be shipped from Illinois and Iowa, and delivered on board cars in Minnesota, was a transaction in interstate commerce.

**Same — finding sustained by evidence.**

3. Plaintiff manufactured tile in Iowa and shipped it to purchasers in Minnesota. The finding of the trial court that plaintiff's transactions were transactions in interstate commerce, and that none of them constituted the doing of business in Minnesota in violation of the statutes of Minnesota, is not overcome by the fact that plaintiff made bids and contracts in Minnesota for furnishing tile for county and judicial ditches and had representatives in Minnesota soliciting such contracts, nor by the fact that plaintiff as a matter of accommodation furnished a contractor with a certified check to file with his bid for constructing a ditch, nor by the fact that plaintiff procured an assignment of money due or to become due under a ditching contract as security for the unpaid purchase price of tile sold the contractor.

**Performance of contract — finding sustained.**

4. The finding that plaintiff had performed its contract in all respects is sustained by the evidence.

**Evidence insufficient.**

5. The evidence falls to show that plaintiff received either pay or credit on another contract for tile furnished for the ditch in question and diverted to another ditch without plaintiff's knowledge or consent.

**Amendment at close of trial.**

6. A proposed amendment to the answer offered after the evidence had

<sup>1</sup>Reported in 173 N. W. 175.

been completed and which failed to state a valid defense was properly disallowed.

**Liability of surety company.**

7. The obligations of a surety engaged in the business of writing bonds for profit are governed by the laws governing insurance contracts.

**Surety not released by default of principal.**

8. The price of the tile furnished by plaintiff was payable in instalments. Defendant, having executed a bond conditioned that the contractor should pay all just claims for material as they became due, is not released from liability thereon by the fact that plaintiff continued to furnish tile as required by its contract after the contractor had defaulted in his payments.

Action in the district court for Martin county to recover \$59,555.03 upon a contractor's bond. The case was tried before Callaghan, J., acting for the judge of the Seventeenth judicial district, who at the close of the testimony denied the motion of defendant Equitable Surety Company to amend its answer, made findings and ordered judgment in favor of plaintiff for \$54,121.36, and interest, and for other sums in favor of two defendants. A motion of the defendant surety company to amend the findings was granted in part and denied in part. Its motion for a new trial was denied. From the judgment entered pursuant to the order for judgment, defendant surety company appealed. Affirmed.

*Kerr, Fowler, Schmitt & Furber*, for appellant.

*H. C. Carlson and H. H. Dunn*, for respondent.

**TAYLOR, C.**

On September 18, 1911, defendant Turnell entered into a contract with the counties of Martin and Faribault to construct the tile portion of Judicial Ditch No. 14 in those counties for the sum of \$161,943. On the same date Turnell, as principal, and defendant Equitable Surety Company as surety, executed the bond required by statute to secure the faithful performance of the contract and the payment of all just claims incurred for labor and material in performing it. Turnell proceeded with the construction of the ditch until January, 1914, when he became financially embarrassed and abandoned the contract. The surety company took over the work and proceeded to complete it. In March, 1915,

plaintiff brought this action to recover pay for tile furnished Turnell before he abandoned the work. The court made extended findings of fact and on October 5, 1918, rendered judgment in favor of plaintiff and against defendants Turnell and the surety company, for the sum of \$69,516.21. The only appeal is by the surety company which will be designated as the defendant hereafter.

1. Defendant asserts that:

"Plaintiff is not entitled to maintain this action because the transactions involved constitute the doing of business in the state of Minnesota by a foreign corporation in violation of state law."

Plaintiff is an Iowa corporation engaged in the manufacture of drain tile at Mason City in that state, has never complied with the laws of this state relating to foreign corporations, and is not licensed to do business in this state. But, if the transactions in question were transactions solely in interstate commerce, plaintiff has the right to maintain its action and enforce payment for its goods sold in such commerce, although not entitled to do intrastate business in this state. *Victor Talking Machine Co. v. Lucker*, 128 Minn. 171, 150 N. W. 790, and cases cited therein. *Fisher v. Wellworth Mills Co.* 133 Minn. 240, 158 N. W. 239, and cases cited therein. Defendant concedes that, if plaintiff confined its business in Minnesota within the domain of interstate commerce, it can maintain this action, but contends that plaintiff engaged in transactions which were not in interstate commerce and which bring the case within the doctrine of *Palm Vacuum Cleaner Co. v. Bjornstad*, 136 Minn. 38, 161 N. W. 215, L.R.A. 1917C, 102, and similar cases. It is undisputed that plaintiff contracted to furnish a specified quantity of tile of specified sizes to Turnell for the sum of \$70,000 to be delivered as ordered by him; that plaintiff was to procure a part of the tile at Streator, Illinois, and was to manufacture the remainder at Mason City, Iowa, and was to deliver it to Turnell f. o. b. cars at designated points in Minnesota, and that under and pursuant to this contract plaintiff shipped the tile in controversy from Streator and Mason City and delivered it to Turnell on board cars at the designated points in Minnesota. That these transactions were within the domain of interstate commerce is too clear to require argument. The transactions on

which defendant relies to support its contention that plaintiff had been doing intrastate business in Minnesota are the following:

A. When Turnell filed the bid on which he secured the contract for Judicial Ditch No. 14, he procured from plaintiff the certified check which he was required to file with his bid. The trial court found as a fact that this transaction "was in no way connected or in consideration of the sale of said tile to said Charles Turnell or the making of the contract between the said Charles Turnell and the said plaintiff for the sale thereof." The evidence concerning this transaction is meagre, and simply shows that plaintiff furnished the check as an accommodation to Turnell and received it back when the contract was executed. There is nothing to show that plaintiff expected or received any consideration for furnishing it, but, even if plaintiff furnished it in the expectation of securing the contract to furnish the tile if Turnell secured the contract to construct the ditch, we think plaintiff's act was not of such a character that it changed the contract for the sale and delivery of the tile from an interstate to an intrastate transaction. All that plaintiff did or contracted to do in respect to the tile was to deliver it on board cars in Minnesota. Plaintiff had no part in incorporating the tile into the general mass of property in the state.

B. Defendant contends that the contract for the sale of the tile was made in Minnesota and that this fact brings plaintiff within the provisions of the Minnesota statute. Whether the contract was made in one state or another has little or no weight in determining whether the transaction was in fact a transaction in interstate commerce. Whether it was such a transaction is to be determined from the provisions of the contract and from what was done or required to be done in performing it.

C. Plaintiff submitted three several bids to Lyon county to furnish tile for ditches to be constructed in that county, and filed with such bids the certified checks required by statute. These bids had no connection with the ditch or contract in controversy, but, passing this point, they were merely offers to sell tile to be delivered in interstate commerce.

D. Plaintiff had representatives in Minnesota, soliciting contracts to furnish tile for ditches to be constructed in Minnesota. No claim is made that plaintiff manufactured tile in Minnesota or kept it in Minne-

sota for sale. Plaintiff merely sought to find buyers in Minnesota for tile manufactured in Iowa, and which, in case of a sale, it undertook to ship from its Iowa factory to the place of delivery designated by the buyer.

E. On October 15, 1913, plaintiff took an assignment from Turnell of all moneys due or to become due to him for the construction of Judicial Ditch No. 14, and also of all moneys due or to become due to him for the construction of another ditch designated as Judicial Ditch No. 7. At this time Turnell owed plaintiff a large amount for tile delivered under the contract in controversy, and plaintiff clearly had the right as a part of its interstate business to collect or secure the payments then past due. It appears however that plaintiff never realized anything from this assignment.

The trial court found as a fact that all the transactions between plaintiff and Turnell were transactions in interstate commerce, and that none of them constituted the doing of business in Minnesota contrary to the statutes of Minnesota, and we are of opinion that this conclusion is amply supported both by the evidence and by the authorities. *York Mfg. Co. v. Colley*, 247 U. S. 21, 38 Sup. Ct. 430, 62 L. ed. 963; *Buck Stove & Range Co. v. Vickers*, 226 U. S. 205, 33 Sup. Ct. 41, 57 L. ed. 189; *Dozier v. Alabama*, 218 U. S. 124, 30 Sup. Ct. 649, 54 L. ed. 965, 28 L. R.A. (N.S.) 264; *Rearick v. Pennsylvania*, 203 U. S. 507, 27 Sup. Ct. 159, 51 L. ed. 295; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. ed. 49; *Victor Talking Machine Co. v. Lucker*, 128 Minn. 171, 150 N. W. 790; *Fisher v. Wellworth Mills Co.* 133 Minn. 240, 158 N. W. 239. Cases holding that a foreign corporation has brought itself within the jurisdiction of the courts of a state by doing business in the state are not in point, as transactions in interstate commerce are sufficient to give jurisdiction in such cases. *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. ed. 479.

2. Defendant claims that plaintiff delayed the work by failing to deliver the large tile as needed, and also that plaintiff furnished a quantity of defective tile which Turnell laid and then had to take up and replace, and that Turnell is entitled to damages for these defaults which should be offset against the amount due plaintiff. The trial court found as a fact that plaintiff had performed all its undertakings and had not

been in default in any respect, and that defendant's allegations concerning these matters were untrue. As we find sufficient evidence to support these findings, defendant's claim cannot be sustained.

3. The court found that all the tile in controversy was furnished by plaintiff for use in constructing Judicial Ditch No. 14, but that Turnell, in violation of his agreement and without the knowledge or consent of plaintiff, diverted a quantity of this tile of the value of \$763.28 from Ditch No. 14 and used it in Ditch No. 7 which he was also constructing at the same time. Turnell had taken the contract to construct Ditch No. 7 and had given a bond to secure the performance of that contract with the American Surety Company as surety. He failed to complete the contract. Defendant contends that plaintiff has received the benefit of the value of the tile diverted from Ditch No. 14 to Ditch No. 7, for the reason that plaintiff had agreed to hold the American Surety Company harmless from any liability on its bond. We fail to find any assignment of error presenting the question sought to be raised, or any evidence which would justify a finding that plaintiff had received either pay or credit for this tile in that transaction.

4. The contract between Turnell and the counties provided for a payment at the end of each month of 75 per cent of the value of the work completed during that month. The contract between Turnell and the plaintiff provided that whenever Turnell received a payment from the counties he should make a payment to plaintiff which should "bear the same ratio to the entire purchase price of said tile" that the payment received by him bore "to the whole contract price for the construction of said ditch," that these payments should be made at the office of plaintiff at Mason City, Iowa, and that any sums not paid when due "shall bear interest at the rate of seven per cent per annum thereafter until paid." The counties made the stipulated payments to Turnell as the work progressed. Defendant alleged in its answer that out of the amounts so received Turnell made payments to plaintiff aggregating more than \$25,000, that plaintiff wrongfully applied these payments on an indebtedness due from Turnell for material furnished for Ditch No. 7, and that defendant is entitled to have these payments applied on the claim now in controversy. Defendant tried the case on this theory and sought to establish the facts so alleged. Both parties presented their evidence,

which is quite voluminous, and rested. Some four months later they appeared before the court and argued and submitted the cause. At the argument additional exhibits were received in evidence by stipulation, among which were the checks, with the indorsements thereon, by which the county treasurers had paid the warrants issued to Turnell for the work performed on Ditch No. 14.

Defendant itself procured and presented these checks, and states in its brief:

"It was after this was done and at this time that it for the first time conclusively appeared from the record that the contractor had made no payments to the respondent for the tile involved in this suit."

Thereupon defendant abandoned its contention that plaintiff had received the payments alleged, and changing front insisted that defendant had been released from liability by plaintiff's failure to collect the payments provided for in plaintiff's contract as they became due. On plaintiff's objection that this defense had not been alleged and was not consistent with the allegations of the answer, defendant asked leave to amend the answer by adding thereto a paragraph, alleging that plaintiff had negligently failed to collect these payments and thereby had released defendant from liability under the bond. This application was denied on plaintiff's objection that the proposed amendment raised an entirely new issue which plaintiff was not then prepared to meet, that it was inconsistent with the answer and with the theory on which the case had been tried, and that it stated no defense.

Defendant contends that the court erred in this ruling, and that plaintiff, having failed to collect any of the payments due from Turnell, discharged defendant from liability on the bond by continuing to deliver tile under the contract after Turnell was in default. The refusal of the court to allow the amendment at the time and under the circumstances here disclosed was not error. 2 Dunnell, Minn. Dig. § 7708, and same section in the 1916 supplement. But, passing this, neither the facts sought to be alleged nor the facts shown by the evidence are sufficient to release defendant from liability. Defendant is engaged in the business of writing surety bonds for profit, and is regarded by the courts as an insurer to whom the strict rules adopted for the protection of accommodation sureties do not apply. *George A. Hormel & Co. v. American*

Bonding Co. 112 Minn. 288, 128 N. W. 12, 33 L.R.A.(N.S.) 513; National Surety Co. v. Berggren, 126 Minn. 188, 148 N. W. 55; Standard Salt & Cement Co. v. National Surety Co. 134 Minn. 121, 158 N. W. 802; Pearson v. United States Fidelity & Guaranty Co. 138 Minn. 240, 164 N. W. 919. Such bonds, like other insurance contracts, are construed most strongly against the insurer, to the end that the insured may secure the indemnity contemplated by the parties when making the contract, and in the absence of a stipulation to that effect are not avoided by unauthorized acts of omission or commission on the part of the beneficiary, unless it be shown that such acts increased the liability of the surety. Philadelphia v. Fidelity & Deposit Co. 231 Pa. St. 208, 80 Atl. 62, and cases cited in note appended to report of this case in Ann. Cas. 1912B, 1085. Even a valid extension of time granted to the principal will not discharge such a surety, unless it be shown to have resulted in substantial prejudice to the surety. Standard Salt & Cement Co. v. National Surety Co. 134 Minn. 121, 158 N. W. 802, and cases cited therein.

Defendant concedes that plaintiff granted no extension of time, but on the contrary demanded the payments. Defendant predicates its present contention on the proposition that "it was the absolute duty of the respondent to collect its proportionate share of the estimates received by Turnell as he received them."

The contract provided that Turnell should make the payments at plaintiff's office, and further provided that instalments not paid when due should bear interest until paid, showing that the parties had in mind that such payments might not be made at the time fixed therefor. There is no provision in the contract imposing any duty on plaintiff to take affirmative action to collect these payments. It was the duty of Turnell to make them. The bond executed by defendant is conditioned that Turnell "shall pay as they become due all just claims for work and labor performed and skill and material furnished." By its bond defendant insured the making of these payments as they became due, and cannot shift the burden which it assumed from its own shoulders to those of plaintiff. Furthermore, the proposed amendment failed to allege that defendant had suffered any loss by plaintiff's delay in collecting the pay for its tile, and the evidence does not go far enough to establish any loss on that account, even if the question were properly before the court.



Defendant relies on *American Bonding Co. v. United States*, 233 Fed. 364, 147 C. C. A. 300, but the facts do not bring the instant case within the doctrine of that case.

We find no other questions requiring special mention.

Judgment affirmed.

QUINN, J., took no part.

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NATHALIE M. COULTER v. JOHN R. MEINING.<sup>1</sup>

June 20, 1919.

No. 21,223.

**Gift — delivery.**

1. When property is purchased by a husband as a gift to his wife, with knowledge on the part of the vendor before the bargain is consummated that the property is bought for the wife and that the title is to pass to her directly, there is a sufficient delivery to sustain the gift, although she does not get actual possession until later.

**Same.**

2. A delivery through a third person is sufficient if he holds the property for the wife.

**Same — avoidance by creditor of donor.**

3. A subsequent creditor of the husband cannot avoid the gift without proof that it was actually intended to defraud creditors and that its purpose and effect were to prejudice them. Neither can he avoid it merely because it may have been made to defraud the husband's existing creditors. In determining whether a valid gift has been made, the law takes cognizance of the facilities with which fraud may be accomplished under the pretence of gifts between husband and wife and of the fact that their every-day life is so blended that it is often difficult to know whether personal property kept where the family resides belongs to one or the other.

**Charge to jury.**

4. There were no errors in the instructions to the jury.

<sup>1</sup>Reported in 172 N. W. 910.

**Verdict sustained by evidence.**

5. Evidence considered and *held* to justify a jury in finding that the husband made a valid gift of an automobile to his wife.

Action in replevin in the district court for St. Louis county to recover possession of an automobile or \$2,300, its value, and \$100 for its detention. The facts are stated in the opinion. - The case was tried before Fesler, J., and a jury which returned a verdict for \$1,800. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

*Courtney & Courtney*, for appellant.

*H. T. Abbott and William P. Harrison*, for respondent.

**LEES, C.**

Action to recover possession of an automobile seized on April 22, 1918, by defendant, as sheriff, upon a writ of attachment against the property of plaintiff's husband, issued in an action brought against him by the Marshall-Wells Company. She had a verdict and this appeal is from an order denying a motion in the alternative for judgment or a new trial.

On May 31, 1917, plaintiff's husband, H. W. Coulter, signed an order for a Cadillac touring car. The stipulated price was \$2,290, of which he then paid \$200. At the same time notes for the balance, running to the Cadillac Company, were executed by Mr. and Mrs. Coulter and part of them were paid. In the spring of 1918 the company took a chattel mortgage on the car from Mrs. Coulter to secure the notes then remaining unpaid.

The sale of the car was first broached in 1916, when there were negotiations between the Coulters and the Cadillac agent at Duluth, which did not result in a sale. Mr. Coulter declined to buy, unless satisfied that his wife could learn to drive a car. This was finally demonstrated. At her request the agent called at her house on the evening of May 31, when her husband was at home. She stated that he was going to buy a car for her. The agent was then told by Mr. Coulter that he wanted to buy the car for Nathalie, and that the agent should teach her how to run and oil it and do all possible work upon it. It was agreed that certain changes should be made in the car so that Mrs. Coulter could

operate it conveniently. Mr. Coulter was absent from home the greater portion of the year, his wife was in poor health and had three young children, and it was his desire that she and the children should be out of doors as much as possible.

After the car was delivered, Mrs. Coulter alone drove it. On June 23, 1917, a state license to operate it was issued to Coulter, and during that month he took out insurance upon it in his own name. On July 10 he gave his wife a bill of sale of the car. In October he paid the wheelage tax on it to the city of Duluth. He obtained the use of a private garage where the car was kept, and in April, 1918, applied for a permit to put up a frame garage near his residence.

In May, 1917, he became a member of a copartnership formed to operate a mine in St. Louis county. The mine was taken over on June 1 and operations were begun about August 1. Purchases of materials used in carrying on the operations were made from the Marshall-Wells Company. The action in which the attachment was levied was brought to recover an indebtedness to that company which arose subsequent to May 31, 1917. There was an offer to show that on or prior to June 1 the partnership had assumed an indebtedness of \$1,861.33 against the mine, and that a number of judgments were recovered against it in February, 1918, on account of debts contracted in operating the mine after May 31, 1917. An objection to the offer was sustained. The jury were instructed that the ultimate question for their decision was, who owned the car on May 31, 1917, and that, if Mrs. Coulter then became the owner of it, they should find that she owned it when it was attached. They were also instructed that Coulter's indebtedness had nothing to do with the question of who was the owner of the car on May 31.

The questions argued are these: (1) Was there a consummated gift of the car on May 31, 1917? (2) If there was, is it open to attack by defendant, who represents a subsequent creditor of the donor? (3) Should evidence of the donor's indebtedness have been received? (4) Was defendant prejudiced by the instruction that the ownership of the car on April 22, 1918, should be determined as of May 31, 1917? (5) Does the evidence justify the verdict?

1. Defendant's contention is that the car was not delivered to plaintiff on May 31, and hence the jury could not find that the alleged gift was

made on that day. *Sorlien v. Rolla*, 126 Minn. 500, 148 N. W. 301, is relied on to sustain this proposition. It was held in that case that, "where the property is in the possession of the donor, or of an agent of the donor, a mere verbal statement made to the donee, without placing him in the possession or control of the property, is not sufficient to vest title in him." The situation in this case is not the same. On May 31 the car was not in Coulter's possession and it was not in the possession of the Cadillac Company as his agent. *Wheeler v. Wheeler*, 43 Conn. 503, comes nearest to this case in its facts. It was held there that if a transaction was an original purchase by the husband for the wife, with knowledge on the part of the vendor before the bargain was consummated that the property was bought for the wife and that the title was to pass directly to her as far as the intent of the parties could make it hers, a consummation of the gift might be found in the execution by the husband of a note for the purchase price, even though the property was not delivered until a later date and was then delivered to the husband.

*Armitage v. Mace*, 96 N. Y. 538, and *Schooler v. Schooler*, 18 Mo. App. 69, also touch upon the subject. In the latter case it was said that a husband may make a gift to his wife without ever having possession of the article given. In contemplation of law, both title and possession may pass to the wife at the time of the purchase, and in such a case no delivery by the husband, actual or symbolical, is necessary.

The law relating to delivery and change of possession is flexible, accommodating itself to the nature of the property and the situation and circumstances of each case. If the article, at the time of the transfer, is in the hands of one who has a lien upon it, notice to him of such transfer is sufficient to constitute a delivery as against subsequent attaching creditors. *Freiberg v. Steenbock*, 54 Minn. 509, 56 N. W. 175. In *Thornton on Gifts and Adv.* § 170, it is said that if a husband purchases a gift for his wife, and the vendor knows that the property is bought for her, there is a sufficient present delivery, although she does not get actual possession until later. Our attention has been called to no other authorities which are helpful.

Upon reason and principle property purchased as this was, and which was never in the possession of the husband, should be treated as held by the vendor for the wife as her agent or bailee. A delivery through a

third person is sufficient, if such person holds the property for the donee. *Varley v. Sims*, 100 Minn. 331, 111 N. W. 269, 8 L.R.A.(N.S.) 828, 117 Am. St. 694, 10 Ann. Cas. 473; *Nelson v. Olson*, 108 Minn. 109, 121 N. W. 609; *Thornton, Gifts and Adv.* § 160.

2. The Marshall-Wells Company became one of Coulter's creditors after May 31. There was no evidence tending to show that the gift of the car was actually intended to defraud his creditors and that its purpose and effect were to prejudice them. A subsequent creditor cannot avoid a voluntary transfer made by the debtor without such proof. *Sanders v. Chandler*, 26 Minn. 273, 3 N. W. 351; *Walsh v. Byrnes*, 39 Minn. 527, 40 N. W. 831; *Schmitt v. Dahl*, 88 Minn. 506, 93 N. W. 665; *Sovell v. County of Lincoln*, 129 Minn. 356, 152 N. W. 727. Neither can he avoid it merely because it may have been made to defraud existing creditors. *Fullington v. Northwestern I. & B. Assn.* 48 Minn. 490, 51 N. W. 475, 31 Am. St. 663; *Williams v. Kemper*, 99 Minn. 301, 109 N. W. 242.

3. Evidence of Coulter's indebtedness on April 22, 1918, when the car was attached, which had arisen subsequent to May 31, 1917, was properly excluded. Plaintiff based her right to recover solely upon the transaction of May 31. If she then became the bona fide owner of the car, it was immaterial that her husband subsequently contracted debts that he could not pay.

4. We fail to see wherein defendant was prejudiced in the instructions under which the case was submitted to the jury. It was left to them to say whether plaintiff became the owner of the car on May 31, or whether her husband was in fact the owner. The conduct of the parties subsequent to the date of the alleged gift was received in evidence. The circumstances set out in the statement of facts going to show acts of ownership on Coulter's part are not conclusive proof that he did not make a gift of the car to his wife. No doubt the facility with which fraud may be accomplished under the pretence of gifts between husband and wife ought to be kept in mind in determining whether or not a gift has been made, but, after everything has been taken into consideration, the one and only question is, whether the alleged gift has been established by a fair preponderance of the evidence. Their every day life is so blended that it is often difficult to know whether personal property kept wher.

the family resides belongs to one or to the other. The law takes cognizance of this fact. Thornton, Gifts and Adv. § 169. In Morgan v. Williams (Ky. Ct. App.), 200 S. W. 650, there were strikingly similar acts on the part of the alleged donor of a car, and a verdict in favor of the donee was upheld.

5. Upon the entire record, we are satisfied that the jury was justified in returning the verdict in plaintiff's favor. At the time of the purchase it appears that Coulter was able to make a gift of the car to his wife. He was a promoter of mining enterprises and had just become a member of a syndicate which doubtless promised the lucrative returns usually anticipated by the promoters of mining ventures. His financial outlook seemed bright to him. He had recently purchased a residence in Duluth for \$25,000. It was mortgaged for \$15,000. His other indebtedness consisted of current personal bills. He had a bank account of about \$5,000. He had entertained the purpose of buying a car for his wife for about a year and probably believed that he was on the road to prosperity and could afford to make the contemplated gift.

Order affirmed.

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JOHN P. COSTELLO v. ALICE G. SYKES AND ANOTHER.<sup>1</sup>

June 20, 1919.

No. 21,227.

**Sale — rescission of contract because of mistake.**

1. A mistake relating merely to the attributes, quality or value of the subject of a sale, or respecting a matter of inducement to the making of the contract, is not sufficient to authorize a court to rescind the contract at the suit of the aggrieved party, where the means of information were open alike to both parties and there was no concealment of facts or imposition.

**Same.**

2. If the parties were mistaken only as to some point which did not affect the substance of the transaction between them, or go to the root of the matter involved, no case for rescission is presented.

<sup>1</sup>Reported in 172 N. W. 907.

**Sale — reliance on books of account by buyer of bank stock.**

3. A person buying bank stock has no greater right to rely on the accuracy of the books and reports of the bank than he would have to rely on those of any other corporation whose stock he was buying.

**Same — rescission because of mutual mistake of fact.**

4. The books of a bank showed that its paid-in capital was intact and that it had a surplus and undivided profits. In fact its capital had become seriously impaired, and it had no surplus or undivided profits. A stockholder sold part of his stock for a price equal to its book value. Both he and the purchaser believed that the books showed the true state of facts. There was no fraud or deception. Both parties were equally innocent in their mistaken belief.

*Held:* That the purchaser of the stock did not have the right to rescind the contract of sale on the ground that there had been a mutual mistake of fact.

Action in the district court for Hennepin county to cancel a sale of bank stock and to recover \$1,300. Defendants demurred to the amended complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, Rockwood, J. From the order sustaining the demurrer, plaintiff appealed. Affirmed.

*Daniel F. Foley*, for appellant.

*Lancaster & Simpson* and *James E. Dorsey*, for respondents.

LEES, C.

Appeal from order sustaining a demurrer to the complaint on the ground that it failed to state a cause of action. In substance the material allegations are as follows:

The Calhoun State Bank was a Minnesota banking corporation, having, according to its books, a paid-in capital of \$35,000, a surplus of \$5,250 and undivided profits of \$6,000. Respondents were stockholders. The par value of a share of stock was \$100. If the bank's capital was unimpaired and it had the surplus and undivided profits shown by its books, a share of stock was worth at least \$136. Respondents sold ten shares of stock to appellant for \$1,360. At the time of the sale the parties to the transaction believed that the bank's capital had not been impaired; that its assets and liabilities were as set forth in its books; that it had the surplus and profits referred to; that its books were kept cor-

rectly, and that the book value of its stock was not less than \$136 per share. In fact it had neither surplus nor undivided profits. Its employees had kept its books so as to conceal defalcations of which they were guilty, and its assets had been depleted until its stock was worth but \$60 per share. Such employees are insolvent and there is no way of making good their defalcations. The parties to the sale were mutually mistaken as to the assets of the bank, the actual value and the book value of its stock, and the amount of its surplus and undivided profits. Upon discovering the truth, appellant tendered the stock to respondents and demanded repayment of the purchase price, and, his demand being refused, sues for a rescission of the contract of sale.

The sole question presented is whether the mistake alleged is of such a character as to give rise to a right to rescind.

The subject matter of the contract of sale was ten shares of the capital stock of the bank. There was no mistake as to its identity or existence. A mistake relating merely to the attributes, quality or value of the subject of a sale does not warrant a rescission. Neither does a mistake respecting something which was a matter of inducement to the making of the contract, where the means of information were open alike to both parties and each was equally innocent and there was no concealment of facts and no imposition.

A leading case is *Kennedy v. Panama, etc., Mail Co.* L. R. 2 Q. B. Cas. 580. Like the one at bar, it involved a contract for the sale of corporate stock. The corporation owned and operated a line of steamships. Both parties bona fide believed that it had obtained a valuable contract to carry government mails, but it turned out that the contract was made without authority. The government refused to ratify it, and so the value of the stock was much less than the parties supposed. It was contended, as it is here, that there was a difference in substance between shares in a company with and shares in a company without such a contract; that this was a difference which went to the very root of the matter involved, and that, therefore, the purchaser was entitled to rescind. The contention did not meet with the court's approval, and it was held that the case was one of innocent misapprehension, that a rescission could not be had, and that there was not such a complete difference in substance between what was supposed to be and what was taken as would



constitute a failure of consideration. The purchaser got the very shares he intended to buy and they were far from being of no value.

Such are the facts in the case at bar, for appellant got the shares he intended to buy. His complaint is that they are worth but \$60, instead of \$136 each. The Kennedy case has been widely and approvingly cited by courts of last resort in this country. The principles it lays down are those which have been approved in the following, among many other, decisions: *Otis v. Cullum*, 92 U. S. 447, 23 L. ed. 496; *Dambmann v. Schulting*, 75 N. Y. 55; *Hecht v. Batcheller*, 147 Mass. 335, 17 N. E. 651, 9 Am. St. 708; *Cavanagh v. Tyson*, 227 Mass. 437, 116 N. E. 818; *Sankey's Ex'rs. v. First Nat. Bank*, 78 Pa. 48; *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28; *Sample v. Bridgeforth*, 72 Miss. 293, 16 South. 876; *Smith v. Tewalt*, 9 Ind. App. 646, 37 N. E. 294; *Wood v. Boynton*, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610; *Moore v. Scott*, 47 Neb. 346, 66 N. W. 441.

Appellant takes the position that there was a mistake as to the existence of the bank's supposed surplus and undivided profits. In this connection it is argued that, since banks are under the supervision of public officials whose duty it is to examine their books and obtain quarterly reports which are published, he had the right to rely on such books and published reports, and that respondents are blamable because they are not correct. It is therefore asserted that the parties to a sale of bank stock do not stand on the same footing as the parties to a sale of stock in other corporations. There are a number of statutory provisions which lend support to appellant's position, but we are not convinced that a mere stockholder in a bank is chargeable as a matter of law with responsibility for the manner in which its books are kept or that greater reliance may be placed upon their accuracy than may be placed upon the accuracy of the books of any other corporation, by a purchaser of its stock.

*Thwing v. Hall & Ducey L. Co.* 40 Minn. 184, 41 N. W. 815, and *Cobb v. Cole*, 44 Minn. 278, 46 N. W. 364, are cited as cases committing this court to a doctrine at variance with that generally adopted in other jurisdictions. *Chapman v. Cole*, 12 Gray, 141, 71 Am. Dec. 739; *Sherwood v. Walker*, 66 Mich. 568, 33 N. W. 919, 11 Am. St. 531; *Hannah v. Steinman*, 159 Cal. 142, 112 Pac. 1094, and cases of similar nature are

also cited, and Professor Williston's language at section 656 of his treatise on the subject of Sales is quoted to sustain appellant's contention.

Thwing v. Hall & Ducey L. Co. *supra*, differs from the case at bar in that it was an action for the specific performance of an executory contract of sale instead of one to rescind an executed contract, and especially in that there was a representation made by the seller to the buyer, relied on by the latter, as to a material fact which was untrue, although the seller believed it to be true.

In Cobb v. Cole, *supra*, the parties had been partners. There was a dissolution and it was agreed that one of the partners who retired from the firm should receive from the others a sum equal to his interest in the firm "as the same then appeared upon the books." A statement was prepared from the books, which was erroneous in fact, although the parties believed it was correct. The retiring partner was allowed to recover the sum actually due him as shown by the books after he had been paid the sum which appeared to be due him according to the erroneous statement.

We see nothing in either case indicating that this court has departed from the generally accepted rules which we stated at the outset.

In Chapman v. Cole, *supra*, plaintiff gave defendant a gold piece, believing it was fifty cents, and was allowed to recover it back on the ground, as stated by the court, that there was a mistake as to the identity of the subject matter of the transaction.

Sherwood v. Walker, *supra*, and Hannah v. Steinman, *supra*, fairly sustain appellant's contention. The former case was decided by a divided court, with a dissenting opinion by Sherwood, J. The effect of the decision was subsequently expressly limited to the peculiar facts of the case in Nester v. Michigan Land & Iron Co. 69 Mich. 290, 37 N. W. 278.

The views of Professor Williston also favor the contention and are entitled to respect. His views do not appear to be shared by other authors. Leake, Contracts (6th Ed.) p. 229; 1 Story, Eq. Jur. § 160; Page, Contracts, § 155; Hammon, Contracts, § 99; Black, Rescission, § 141. The weight of authority is with the respondents so far as the general principle under consideration is here involved.

If the question were one of first impression, we should not be inclined to open up a new field for litigation by adopting the rule that a con-

tract for the sale of corporate stock may be rescinded merely because both parties were mistaken about the nature or extent of the assets or liabilities of the corporation, if the means of information are open alike to both and there is no concealment of facts or imposition. Upon the sale of a note both parties may be mistaken as to the solvency of the maker or of an indorser or guarantor of payment, and may deal on the assumption that the paper is good, when in fact the unknown insolvency of the parties liable for its payment makes it worthless.

In the absence of fraud or inequitable conduct on the part of the seller of property of that kind, we had supposed the buyer could not have a rescission. He can always protect himself against possible loss by requiring the seller to guarantee or secure the payment of the paper. See *Day v. Kinney*, 131 Mass. 37; *Burgess v. Chapin*, 5 R. I. 225. We think this should be the rule when stock in a corporation is the subject of a contract of sale, and conclude that the learned trial judge correctly disposed of the case and the order sustaining the demurrer is affirmed.

HALLAM, J. (dissenting).

I dissent:

In my opinion the following statement by Williston:

"If parties enter into a bargain on the assumption that certain things are true, it is inequitable to enforce the bargain, to allow it to stand if the mistake relates to a matter so fundamental that it must be assumed that the parties would not have entered into the transaction had they known the truth." Williston, *Sales*, § 656, and the following statement by Benjamin:

"When there has been a common mistake as to some essential fact forming an inducement to the sale, that is, when the circumstances justify the inference that no contract would have been made if the whole truth had been known to the parties, the sale is voidable," Benjamin, *Sales* (7th Ed.) § 415, are good law.

In *Thwing v. Hall & Ducey L. Co.* 40 Minn. 184, 41 N. W. 815, this court stated the same rule in this language:

"The mistake we are now considering was occasioned by the ignorance of both parties of a fact under the influence of which they entered into

a contract that would not have been executed had they possessed full knowledge of the situation. \* \* \* It may also be stated, generally, that affirmative or defensive relief, such as is required by the circumstances, may be granted from the consequences of a mistake of any fact which is a material element of the transaction, and which is not the result of the mistaken party's own violation of some positive legal duty, if there be no adequate remedy at law."

In that case specific performance was asked by plaintiff. Rescission was asked by defendant. The court rescinded.

This court has repeatedly re-affirmed and applied the same principles. *Cobb v. Cole*, 44 Minn. 278, 46 N. W. 364; *Marple v. Minneapolis & St. L. R. Co.* 115 Minn. 262, 132 N. W. 333, Ann. Cas. 1912D, 1082; *Bethhold v. King*, 134 Minn. 105, 158 N. W. 910. See also *Ketchum v. Catlin*, 21 Vt. 191; *Hoops v. Fitzgerald*, 204 Ill. 325, 68 N. E. 430; *Fritzler v. Robinson*, 70 Iowa, 500, 31 N. W. 61.

I do not think we should depart from them. It cannot be said that no mistake as to either "attributes, quality or value" gives ground for rescission. In *Thwing v. Hall & Ducey L. Co.* 40 Minn. 184, 41 N. W. 815, there was a mistake as to "attributes" of the property. I cannot distinguish this case from *Cobb v. Cole*, 44 Minn. 278, 46 N. W. 364. It seems to me there was a mutual mistake, not as to quality or value but as to certain tangible facts so fundamental that it must be assumed that the parties would not have entered into the contract had they known the truth.

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PATRICK HAMMEL v. THOMAS FEIGH AND OTHERS.

J. D. MAHONEY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF THOMAS FEIGH, DECEASED, APPELLANT.<sup>1</sup>

June 20, 1919.

No. 21,254.

**Partnership — parol contract as to tract of land.**

1. There may be a partnership in real estate formed by parol, notwithstanding the provisions of the statute of frauds requiring contracts

<sup>1</sup>Reported in 173 N. W. 570.

relative to interests in real estate to be in writing, and it may be limited to a designated tract of land.

**Partnership — statute of frauds — accounting after completion.**

2. The provision of the statute of frauds relative to agreements not to be performed within a year, if applicable to a contract of partnership such as found in this case, is not effective after the purposes of the partnership are accomplished, and an accounting in such a case will be had in accordance with the terms of the oral partnership agreement.

**Same — finding sustained by evidence.**

3. The evidence sustains a finding that there was a partnership by oral agreement between the plaintiff, Hammel, and Feigh, the original defendant, now deceased, in whose name title was taken, in a particular tract of land upon which a mine was developed.

**Same — not affected by registration of title.**

4. The registration of the land under the Torrens system made with the consent of the plaintiff and with the understanding that it should not affect his rights, did not affect them, and if there was a partnership in the property before registration there was afterwards.

**Misconduct of counsel — new trial.**

5. There was impropriety in the conduct of counsel for plaintiff in stating before the jury that he could prove certain facts which were wholly immaterial and of which proof was inadmissible. Whether a new trial should be granted for misconduct is largely within the discretion of the trial court. It is *held* that it was not error to refuse a new trial upon the ground of misconduct.

Action in the district court for Crow Wing county for a dissolution of partnership, an accounting between the parties and that plaintiff be decreed to be the owner of an undivided one-half interest in certain real estate. The case was tried before Stanton, J., who at the close of the testimony denied defendant's motion that the jury be directed to return a verdict in his favor and that the jury be directed to answer "No" to the question which follows, and a jury which answered "Yes" to the question: "Were the plaintiff and defendant Thomas Feigh partners as alleged in the complaint with reference to the lands specifically described in said complaint?" The judge made findings and ordered judgment in favor of plaintiff for \$135,689.30. From an order denying his motion to amend the findings and for judgment in his favor notwithstanding the

verdict or for a new trial, J. D. Mahoney, as special administrator of defendant Feigh, appealed. Affirmed.

*Baldwin, Baldwin & Holmes, Albert Fink and George H. Sullivan,* for appellant.

*Fryberger, Fulton & Spear and A. T. Rock,* for respondent.

DIBELL, J.

Action for a partnership accounting.

The plaintiff, Patrick Hammel, claims that there was a partnership created by oral agreement between himself and the original defendant, Thomas Feigh, who died after the trial, covering certain land on the Cuyuna Range. The question whether there was such a partnership was submitted to a jury which found that there was. The court made findings for the plaintiff. The administrator of Feigh, J. D. Mahoney, substituted as defendant, appeals from the order denying the motion for a new trial.

1. An agreement by two parties to combine their money and efforts and skill and knowledge and purchase land for the purpose of reselling or dealing with it at a profit is a partnership agreement, or a joint adventure having in general the legal incidents of a partnership. The agreement may be oral without offending the statute of frauds relative to the creation or transfer of interests in land. The title may stand in one or in both. The agreement may relate to a designated tract or to lands generally. One may contribute all of the effort and skill and knowledge and the other all of the money, or they may contribute in such way as they choose, and the division of anticipated profits or possible losses may be upon such basis as the parties by their contract determine. These principles are stated over and over again and are applied to the varying facts of different cases. *King v. Remington*, 36 Minn. 15, 29 N. W. 352; *Newell v. Cochran*, 41 Minn. 374, 43 N. W. 84; *Fountain v. Menard*, 53 Minn. 443, 55 N. W. 601, 39 Am. St. 617; *Baldwin v. Eddy*, 64 Minn. 425, 67 N. W. 349; *Stitt v. Rat Portage Lumber Co.* 98 Minn. 52, 107 N. W. 824, 6 L.R.A.(N.S.) 191, 116 Am. St. 387; *Church v. Odell*, 100 Minn. 98, 110 N. W. 346; *Irvine v. Campbell*, 121 Minn. 192, 141 N. W. 108, Ann. Cas. 1914C, 689; *Son-*

nesyn v. Hawbaker, 127 Minn. 15, 148 N. W. 476; Kruse v. Tripp, 129 Minn. 252, 152 N. W. 538.

A sharing in profits does not necessarily make a partnership. Thus where two agree that the one shall advance the money and the other buy land and care for it and when sold there shall be a division of net profits, the arrangement may amount to an employment and fixing of compensation and not to a partnership. Such a case was Davis v. Peterson, 59 Minn. 165, 60 N. W. 1007. And where one is in position to acquire title to property, and acquires it for another and in such other's name, under an agreement that he is to have an interest in the land, such an arrangement does not alone make a partnership or joint adventure, and it is unenforceable because of the statute of frauds. Such a case was Bennett v. Harrison, 115 Minn. 342, 132 N. W. 309, 37 L.R.A. (N.S.) 521. It is essential that there be a joint contribution to the enterprise and something in the nature of a community of interest in it and its results.

2. The defendant, citing Grand Forks Lumber Co. v. McClure Logging Co. 103 Minn. 471, 115 N. W. 406, contends that an oral partnership agreement is invalid within the statute of frauds referring to agreements not to be performed within one year, and that the one claimed between the plaintiff and the defendant was not to be performed within a year and was therefore invalid. G. S. 1913, § 6998. Without deciding the question suppose it be so. The property engaged in the enterprise or resulting from it is not lost nor destroyed because there is no writing. Neither partner can exclude the other from it because he happens to be in possession of it or because he has the legal title. Some of the cases suggest that a partnership within the statute is a partnership at will and what is voluntarily done under it is just as effective as if there were a writing. Wahl v. Barnum, 116 N. Y. 87, 22 N. E. 280, 5 L.R.A. 623; Sanger v. French, 157 N. Y. 213, 51 N. E. 979; 20 R. C. L. 811; Burdick, Part. 15; Gilmore, Part. 93; 1 Rowley, Part. § 212.

This is an action for an accounting. The parties, as is noted later, accomplished the main purpose of their partnership. They performed, or at least the plaintiff did. The contract of partnership is no longer executory and the statute is without application to the present situation.

Blake v. J. Neils Lumber Co. 111 Minn. 513, 127 N. W. 450, and cases cited.

3. The important question is whether there was a partnership by oral agreement between Hammel and Feigh of which the particular land was the subject matter. Hammel resided at Duluth and had considerable practical knowledge of the Cuyuna range and its mineral possibilities. He was without any considerable amount of money. Feigh, also residing at Duluth, was not familiar with the range, but had money and business sagacity. The two were intimate friends for many years and had many land transactions together. At the time of the trial in June, 1917, Hammel was 67 and Feigh 89 years of age.

On June 3, 1905, one Blackwood had an oral option whereby he could sell 320 acres or a little less of land on the Cuyuna range for \$3,420, on which ten per cent earnest money must be paid immediately. Hammel procured this option from him. He then presented the matter to Feigh, and without much negotiation an understanding of some kind was reached. Feigh gave Hammel a check for \$343 for the initial payment and it was so applied. Later, on June 21, he gave him a check for \$3,077 with which to close. Afterwards he paid Hammel the expenses which he incurred in closing the deal, and it is claimed by him, but denied by Hammel, that he paid him a small sum besides for services. Hammel years ago was register of deeds of LeSueur county, had dealt considerably in lands, and had a serviceable knowledge of titles, and he saw to the title, and the execution of deeds, and the closing of the transaction. Title was taken in the name of Feigh.

Efforts were made almost immediately, through options given, to develop the property and some exploratory work was done. Some ore was discovered, but a working lease did not result immediately. Finally, after somewhat continued and prolonged negotiations with different people, an option was taken by the C. M. Hill Lumber Company, which resulted in a lease executed May 24, 1910. Under this lease or assignments and modifications of it a producing mine was developed and operated.

It is the claim of Hammel that his agreement with Feigh, as finally made, was that the Blackwood option should be closed; that Feigh should furnish the money; that he, Hammel, should attend to the closing of the



deal; that the land should be kept and handled jointly for profit through mineral development and not immediately sold; that they should share equally in the profits after Feigh was paid his investment in money; that there was a joint contribution to the undertaking and a community of interest, and that the agreement was in fact a partnership one. Feigh denies it.

Some eight or nine witnesses testify that Feigh, on dates or occasions which they assume to fix, and generally eight to twelve years before, stated to them or in their presence in substance that Hammel had an interest in the property or was a partner. Such testimony given after so long a lapse of time is necessarily subject to imperfections. That given was admissible. Some of it was bad. The credibility and weight of it all were for the jury.

There is evidence that in the negotiations for a lease, commencing soon after the acquisition of the property, Hammel took an active part with Feigh. Concededly he brought the property to Feigh. If his testimony is true he got nothing and was to get nothing for his services.

From 1903 on Hammel and Feigh were concerned in some 20 or more land deals mostly in the Cuyuna region, though a few were in Duluth. Hammel had upwards of 50 in the Cuyuna region in which Feigh was not interested. In some of the transactions in which the two were interested Hammel got a commission. In some he obtained the right to sell at a fixed price and Feigh found a purchaser and there was a division of profits. Sometimes an undivided interest in the land was sold for the full price at which he was authorized to sell so that an undivided interest in the land was acquired by way of profit. In some the land was taken in Feigh's name and when sold there was a division of profits. Usually quick turns were made. These transactions indicate that Hammel and Feigh were working in harmony and that a sharing in profits was common. They are not decisive in favor of one or the other. They furnish a basis of argument for each upon the question of fact in issue.

Hammel's testimony is not always satisfactory. Often it is uncertain and evasive of direct inquiry. Sometimes he forgets. Many times he is proved to be mistaken. He does, though, cling to his claim of talks and doings with Feigh sufficient, if true, to constitute a partnership agreement. Some things discredit him.

In June, 1905, he deposited Feigh's check for \$3,077 in a Brainerd bank for the purpose of closing the deal and the deposit was checked out. Shortly before the trial he asked the bank to send him the checks and it seems rather certain that they were sent. He did not produce them at the trial. His excuse for not producing them is weak and his effort to charge one of counsel for the defendant with responsibility for their absence detracts in our view from his explanation. The defendant claimed that Hammel got a commission from Blackwood. These checks would have shown how the transaction of 1905 was closed. There was some other evidence that Hammel got a commission from Blackwood. If he did, that fact had a direct bearing upon the question whether there was a partnership with Feigh.

Hammel at one time applied to a Duluth bank for a loan and made a property statement which included his Cuyuna interests, but did not include the Feigh mine. At a time when the value of the mine was assured he sought a loan of \$8,000 or \$9,000 from Feigh and took a refusal without complaining. In May, 1911, when the mine was earning royalties, and when Feigh had received upwards of \$13,000, which was many times his investment, Hammel testified as an expert in the Federal court at Duluth as to the value of Cuyuna lands. He testified to selling the lands to Feigh and stated that the only interest he had in Cuyuna property was a one-eighth interest in a mine then being developed. He spoke of the Feigh mine as "probably the largest on the range." His testimony was frank to the effect that he had not been fortunate in acquiring mining property on the range, seemed to evince a regret, but was not of a complaining character. Afterwards, and when his share of the accumulated royalties was something like \$100,000, he sold some of his Cuyuna interests at a sacrifice and borrowed money on others of them. The land was conveyed to the Thomas Feigh Land Company, and registered in its name. Feigh had all the stock. No one connected with the transfer, unless it be Feigh, was apprised of Hammel's claim.

Hammel's long delay in asserting his rights is against him. The mine became a revenue producer in 1910. The minimum output the first year was 45,000 tons, and increased rapidly, and the royalty was 35 cents. Hammel made no demand of Feigh then or until about the beginning of

1914, though it is evident that he could have conveniently used a portion of the accrued royalties which belonged to him. He explains his delay by saying that he thought Feigh would finally comply with the partnership agreement, and further that he had consented that out of the first royalties Feigh might use certain sums for his church and charities in which he was much interested and in which he, Hammel, was in sympathy.

Both had the same church affiliations. From 1910 to 1916 Feigh did expend something like \$90,000 in connection with his church or in charitable work. He built two or three small churches and started a home for cripples. He was himself a cripple. He seemed to get dissatisfied with his donations and results coming from them and they ceased. Suit was brought in November, 1916. At that time the accrued royalties exceeded \$200,000. Hammel was even then a little reluctant about bringing suit.

Feigh claims that there was no partnership agreement. His many deals with Hammel in lands in the Cuyuna region he recounts from memory with considerable definiteness. His testimony is in direct denial of that of Hammel. He claims that Hammel was paid a small sum for his services in closing the deal. Sometimes he paid him small sums for services. Several witnesses testify to circumstances in his favor. One or more testify that Hammel said that Blackwood agreed to divide commissions with him but only gave him a small amount, and several that he said in substance that he had no interest in the land, but expected some day Feigh would give him something. Such testimony is subject in a measure to the infirmities attaching to that offered in behalf of Hammel of admissions of Feigh, though in general the witnesses were testifying to events of more recent occurrence.

The facts are such as well enough to justify the argument, and a finding, that there was no partnership, but that Hammel expected that he would be given something substantial if the property turned out well. The argument is forcefully made that what with Hammel was originally a hope of a gratuity became upon much thinking over it a promise of a reward, which finally emerged in a definite claim of partnership right, but such argument is one on a question of fact. And the argument is well enough made that Feigh and Hammel really formed a partnership; that Feigh intended to carry it out; that if there had been a sale soon at

a moderate profit he would have done so and the profits would have been divided, but that when the property, after many years of working and waiting, became very valuable, and when he was weakened by ill health and advancing years, and was perhaps under the influence of relatives, he decided that he would keep it all regardless of Hammel's rights, or that he perhaps got in a mental condition where he believed that the property was his of right and that Hammel's claim was without merit. This, too, is an argument on a question of fact.

It is difficult to gather from the record the characteristics of litigants, but there is much to indicate that Feigh was in some respects peculiar but of marked vigor and shrewdness; that he was somewhat close in his dealings, and of considerable skill in accumulating property, and that he was, when angered, stubborn and unyielding. Hammel was apparently easy-going, rather careless of his deals, perhaps generously inclined, not particularly thrifty, and surely not self-assertive if his story be a true one.

As we read the record there is no ground for ascribing to Feigh all the bad qualities which the plaintiff's brief attaches to him. Aside from this one transaction in which the finding is against him, Feigh was surely enough a good and much used friend of Hammel for many years, and Hammel helped Feigh too.

We have read all of the evidence and the exhaustive briefs of counsel. A complete review of the evidence is impossible within the proper limits of the opinion nor would it be useful. That which we have made is imperfect. We have not stated all the claims of the parties as to evidentiary facts nor the explanations given by Hammel of many occurrences to which reference is made. It is not to be supposed that the jury believed everything that was told. It had the two men before it and took their measure and determined the considerations that affected them and the probability of the stories they and other witnesses told and the explanations they gave. Likely it sifted the evidence and rejected the incredible and drew proper inferences. The question whether there was a partnership was submitted fairly in a charge to which there was no objection, and the finding of the jury, approved by the trial court, is final.

4. On December 1, 1909, Feigh conveyed the land to the Thomas Feigh Land Company, a corporation organized to take it. Upon Febru-

ary 17, 1912, the land was registered under the Torrens law. Hammel was not made a party to the registration. He knew of it. The court finds that he acquiesced in it, that it was understood between him and Feigh that it would not affect the partnership transaction or his rights, and that the registration was in furtherance of the partnership business.

It is claimed that the decree of registration bars the plaintiff. We are unable to see it so. The court's finding that the decree was entered under an understanding between Hammel and Feigh is sustained. He was not a party to the proceeding. If there was a partnership in the property before there was a partnership after the registration decree. If it were not so a partnership having among its assets land of record in the name of one of them would lose it if it were registered in his name. This holding does not trench upon the well recognized theory that a Torrens decree creates an indefeasible title and is not merely evidence of title. *Henry v. White*, 123 Minn. 182, 143 N. W. 324, L.R.A. 1916D, 4; *Baart v. Martin*, 99 Minn. 197, 108 N. W. 945, 116 Am. St. 394; *State v. Westfall*, 85 Minn. 437, 89 N. W. 175, 57 L.R.A. 297, 89 Am. St. 571.

No rights of innocent purchasers are involved. It is not necessary to invoke the provision of G. S. 1913, § 6918, relative to registrations procured by fraud. After the registration the land was deeded to Feigh. If there was a copartnership between him and Hammel in this land before the deed to the company and the registration there was when the title again came to him.

5. One ground of the motion for a new trial is misconduct of counsel for the plaintiff resulting in prejudice to the defendant. The misconduct claimed can be stated shortly.

Upon the cross-examination of one of the plaintiff's witnesses he volunteered a remark to the effect that it was common talk about Duluth that Feigh was "throwing" Hammel. To some extent counsel for the defendant cross-examined upon this remark. Another witness for the plaintiff on cross-examination was interrogated by counsel for the defendant about such rumors. Some two days later counsel for the plaintiff, as a part of his main case, asked one of his witnesses as to the common report on the streets of Duluth about Feigh "throwing" Hammel. What transpired in this immediate connection is best shown by letting the record speak:

By Mr. Fryberger:

Q. Mr. Klippen, what is the common report on the streets of Duluth and has been common report for the last three or four years about old man Feigh throwing his partner, Pat Hammel, in this mining deal?

Mr. Baldwin: Object to that as irrelevant and immaterial.

The Court: Objection sustained.

Mr. Fryberger: All right. They won't let us go into it.

Mr. Baldwin: You knew you could not go into it. You knew it was improper.

Mr. Fryberger: Well, you went into it with two witnesses.

Mr. Baldwin: What is that?

Mr. Fryberger: I can bring plenty of witnesses if you will let me go into it, to show that.

Mr. Baldwin: I will ask the court to instruct the jury that that was an improper remark and to disregard it.

The Court: It was an improper remark.

Mr. Baldwin: And we take an exception to it.

Mr. Fryberger: I beg pardon of the court if it was improper.

We engage in no discussion and cite no authorities whether the conduct of counsel in thus pressing the matter was improper. It was. The trial court said so. It is not supposable that anyone connected with the trial thought that the issue as to partnership could be tried by inquiring what street rumors in Duluth were. A new trial upon the ground of misconduct is not granted as a disciplinary measure but because injustice has been done. *Smith v. Great Northern Ry. Co.* 133 Minn. 192, 158 N. W. 46, and cases cited. Whether one shall be granted is largely in the discretion of the trial court. *Smith v. Great Northern Ry. Co.* 133 Minn. 192, 158 N. W. 46, and cases cited; *Wadman v. Trout Lake Lumber Co.* 130 Minn. 80, 153 N. W. 269; *Wells v. Moses*, 87 Minn. 432, 92 N. W. 334. The trial court exercised its discretion upon the motion for a new trial. It knew much better than we the importance or lack of importance of the incident. It found that there was no misconduct requiring a new trial. We pass this feature of the case with the remark that we cannot say from the record that it was error to deny a new trial upon the ground of misconduct.

We see nothing in the claim of a bar by the statute of limitations or

by laches requiring discussion. All of the points discussed in the briefs have had consideration and we find nothing requiring further mention. Order affirmed.

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STATE v. WILLIAM LUDEMANN.<sup>1</sup>

June 20, 1919.

No. 21,269.

War — assisting United States — Red Cross Society.

Defendant had refused to join the Red Cross Association when requested to so do by a subcommittee, appointed through or by the association. He was reported to the head committee whose four members visited defendant at his home, for the stated purpose of obtaining from him his reasons for not joining, if he persisted in his refusal to join. For the language used in giving his reasons to the head committee, when so visited, defendant was convicted. No one but the members of the committee was present when the words were uttered. It is *held*: The circumstances under which the words were spoken exclude the inference that there was a teaching or advocating in violation of section 3, chapter 463, Laws 1917.

Defendant was indicted by the grand jury of Wright county charged with the crime of interfering with enlistment, tried in the district court for that county before Giddings, J., and a jury which found him guilty as charged in the indictment. From an order denying his motion to set aside the verdict and for a new trial, defendant appealed. Reversed.

*H. C. West* and *C. D. O'Brien*, for appellant.

*Clifford L. Hilton*, Attorney General, *James E. Markham*, Assistant Attorney General, and *Stephen A. Johnson*, County Attorney, for respondent.

HOLT, J.

The defendant was indicted and convicted of having unlawfully advocated that citizens of this state should not aid or assist the United States in prosecuting war with its public enemies, contrary to the provisions of

<sup>1</sup>Reported in 172 N. W. 887.

section 3, chapter 463, p. 764, Laws 1917. The appeal is from the judgment.

There are many assignments of error, but only one will be considered, since that disposes of the case upon the merits.

The object of the law referred to was to prevent people from attempting to persuade others to refrain from aiding the government in carrying on the war with Germany. It was plainly not designed to force citizens to contribute to, or to join the Red Cross or any kindred association of whose valuable assistance the government has availed itself all through the war. Finding fault with either the government or the societies engaged in war activities, is not made a crime, unless the criticism is made under such circumstances that it is permissible to draw the inference that citizens were thereby taught not to aid the government in the prosecution of the war. The circumstances under which the language attributed to defendant, was spoken, must therefore be looked to, in order to determine whether there was a violation of the statute.

Shortly before the time when defendant is charged with the commission of the offense, there had been committees duly appointed in Wright county, Minnesota, by the National Red Cross Association, to solicit members and funds for the association. There were head committees and subcommittees. Defendant was a farmer, residing some miles from Buffalo, the county seat. A subcommittee of two members had visited his farm on December 16, 1917, and had requested him to pay one dollar and become a member of the Red Cross Association. He refused and was at once reported to the head committee, consisting of Messrs. Adams, Price, Mithun and Swenson. The next day these four men drove to defendant's farm, and found him on or near the porch of his dwelling. No one else was there. Mr. Adams, the spokesman of the committee, stated to defendant that their purpose was to procure the membership of the ones visited or "get them to give some reason why they should not join." Mr. Adams' version of what then occurred, corroborated by the testimony of his associates, is substantially this: After the introductory remark mentioned he continued by saying that there was, perhaps, no need to explain the work of the Red Cross organization to a man of defendant's intelligence. The latter responded: "Yes, I know all about the American Red Cross Society, and I will not have anything to do with it



or with any of the other side issues; let the government do the work the Red Cross is trying to do." Mr. Adams then said that the government was doing all in its power, and that the Red Cross Association was simply seeking to aid in carrying on the war. Defendant responded: "I don't care anything about the war, the government got us into it and let the government get us out of it and that it was entirely unnecessary, and for me I am damn sick of it anyhow." Mr. Mithun thereupon made some remark that they simply called to ask him to join the society and pay his dollar, a small amount. Defendant then said: "You are always out here asking for money. Some ass in the government employ sent a man out here to count my seed corn; why in hell didn't they send a man out here to help me gather that corn?" Upon further urging to join he responded: "I told you I would not join that \* \* \* grafting association. \* \* \* How do I know what you men will do with the money you get? \* \* \* You four men have come out here to coerce and intimidate me into joining. \* \* \* Why don't the government raise this money by direct taxation?"

This committee came to defendant to urge him to join the Red Cross Association and pay the membership fee, or have him give a reason for not doing so. He gave his reason in the privacy of his own home upon the demand of the committee. No matter how poor or even wicked the reason was, his statement thereof, given upon the request of the committee, should not be held a violation of either the letter or the spirit of the law. Defendant had not sought the interview. He was not trying to influence the committee. He was simply excusing as best he could his own conduct. Had these words been spoken at a public gathering, or had defendant sought the opportunity to express to citizens generally sentiments regarding the Red Cross Association such as the jury found he did express, an inference of forbidden teaching could readily have been drawn. But we think the circumstances under which defendant here was called upon to give expression to his thoughts exclude such inference. *State v. Spartz*, 140 Minn. 203, 167 N. W. 547.

The view taken by a Federal judge of section 3 of the Espionage Act of Congress of June 15, 1917 (40 St. 219), in *United States v. Pape*, 253 Fed. 270, meets with our approval, and is applicable to the case in hand, wherein he answers in the negative the question: "Can a citizen

be prosecuted criminally for giving his reasons for not subscribing for Liberty Loan bonds and thrift stamps, and contributing to Red Cross drives when requested to do so in the privacy of his own home and in the presence of nobody other than the members of a duly authorized committee, and especially when those reasons are mere matters of opinion apparently honestly held?" Continuing the judge said: "It is clear to this court that a criminal prosecution cannot be based on the failure of a citizen to subscribe for bonds, or thrift stamps, or to contribute to patriotic funds, so long as he does not endeavor to get others to do likewise. \* \* \* A citizen has a legal right not to buy or subscribe during the great drives, for any reason that is satisfactory to him, provided he does not attempt to get others to accept his views, or to follow his acts in line with his views, for the purpose of interfering with the operation of the military establishment of the United States."

The case at bar is to be distinguished from the one of *State v. Hartung* 141 Minn. 207, 169 N. W. 712, where the words spoken by the accused were so spoken in the presence of others than the committee soliciting the subscription and where no reason for a refusal to subscribe was asked for.

In the statement of the case we have not endeavored to give defendant's version of the visit, for evidently it was not accepted as true by the jury.

We are of the opinion that the evidence is insufficient to show an offense against section 3 of chapter 463, p. 764, Laws 1917.

The judgment is reversed and the verdict vacated.

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GUSTAVE A. CARLSON v. MINNEAPOLIS STREET RAILWAY  
COMPANY.<sup>1</sup>

June 20, 1919.

No. 21,273.

**Workmen's Compensation Act — employer's right of subrogation.**

1. Under the Workmen's Compensation Act, chapter 467, p. 765, Laws 1913, the employer's right to recover the amount which he was compelled

<sup>1</sup>Reported in 173 N. W. 405.

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to pay to his employee's dependents from a third party, whose act was the cause of the accident, depends upon whether the negligence of such third party was the proximate cause of the injury.

**Workmen's Compensation Act — election of remedy by injured employee.**

2. Under the Workmen's Compensation Act, where an employee is injured in the course of his employment by the actionable negligence of a third party, a statutory remedy accrues to him or his dependents for compensation against his employer, and a common law remedy against such third party, though he cannot proceed against both. If he elects to pursue the former remedy, he waives the latter, and his employer is subrogated to the right.

Action in the district court for Hennepin county to recover \$3,659.13 damages awarded Dorothy Rapley, under the Workmen's Compensation Act, for the death of her husband while in the employ of plaintiff. The answer admitted that one Charles J. Rapley was injured by colliding with a street car of defendant, but denied that the collision occurred as alleged in the complaint and denied that it was caused by any negligence on the part of defendant. The case was tried before Fish, J., who at the close of the testimony denied defendant's motion for a directed verdict and a jury which returned a verdict for defendant. Plaintiff's motion for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the order for judgment, plaintiff appealed. **Affirmed.**

*Olof L. Bruce, John Lind and A. T. Larson, for appellant.*

*R. T. Boardman and W. D. Dwyer, for respondent.*

**QUINN, J.**

Plaintiff was engaged in the scavenger business in the city of Minneapolis. Charles J. Rapley was employed as one of his teamsters, and during the early morning of June 30, 1915, while in the performance of his duties, he dumped a load of waste into the river below the Washington Avenue bridge, and then started on his way home. He drove up the incline from the river and along Twenty-first Avenue south to its intersection with Washington Avenue. As he turned to the east to cross the bridge, one of defendant's street cars approached and struck the left wheel of the wagon, throwing Rapley from his seat on the wagon to the

pavement, thereby injuring him so that he died within a short time. At the time of the accident, deceased, the appellant and respondent were all subject to the provisions of chapter 467, p. 675, Laws 1913, the Workmen's Compensation Act. Rapley left surviving him Dorothy, his wife, and several minor children, as dependents. Mrs. Rapley proceeded against the appellant under the Compensation Act. She recovered at the rate of \$10.80 per week for the period of 300 weeks, beginning July 14, 1915, and in addition thereto the sum of \$100, funeral expenses. The proceedings were reviewed by this court, the judgment affirmed, and appellant paid the sum of \$3,340 thereon.

The plaintiff seeks to recover from the defendant in the present action, under the Compensation Act, the amount which he was so compelled to pay upon the judgment referred to, with costs and expenses. At the trial the court submitted to the jury, whether negligence on the part of the defendant, or its employees, caused the collision which resulted in the injury and death of Rapley. The jury found that there was no neglect on the part of the defendant or its employees. Plaintiff moved for a new trial, on the ground that the verdict was not justified by the evidence and was contrary to law. The motion was denied. Plaintiff then moved the court to proceed with the trial and for judgment in his favor. This motion was denied, judgment entered in favor of the defendant and the plaintiff appealed.

It is alleged in the complaint that, while in the course of his employment as plaintiff's teamster, Charles J. Rapley was driving across the defendant's track at the intersection of Twenty-first Avenue and Washington Avenue south, in the city of Minneapolis, the defendant company so carelessly and negligently ran and operated one of its street cars that it struck the wagon belonging to plaintiff, in which Rapley was then riding, with such force that the driver was thrown therefrom to the pavement and so injured that he died shortly after.

Section 8229, G. S. 1913, reads as follows:

"That where an injury or death for which compensation is payable under part 2 of this act is caused under circumstances also creating a legal liability for damages on the part of any party other than the employer, such party also being subject to the provisions of part 2 of this act, the employee in case of injury or his dependents in case of death,

may, at his or their option, proceed either at law against such party to recover damages, or against the employer for compensation under part 2 of this act, but not against both.

"If the employee in case of injury, or his dependents in case of death, shall bring an action for the recovery of damages against such party other than the employer, the amount thereof, manner in which and the persons to whom the same are payable, shall be as provided for in part 2 of this act and not otherwise; provided that in no case shall such party be liable to any person other than the employee or his dependents for any damages growing out of or resulting from such injury or death.

"If the employee or his dependents shall elect to receive compensation from the employer, then the latter shall be subrogated to the right of the employee or his dependents to recover against such other party, and may bring legal proceedings against such party and recover the aggregate amount of compensation payable by him to such employee, or his dependents hereunder, together with the costs and disbursements of such action and reasonable attorney's fees expended by him therein."

It is contended on behalf of the plaintiff, that he is entitled to recover from the defendant company, under the act, the amount which he was required to pay to decedent's dependents, regardless of whether it was guilty of negligence contributing to the accident. The statute provides, that where an injury or death is caused for which compensation is payable, under such circumstances as to create a liability for damages on the part of any party other than the employer, who is also subject to the provisions of part 2 of the act, the employee or his dependents, as the case may be, may proceed, either at law against such other party than the employer to recover damages, or against the employer for compensation, but not against both—clearly distinguishing between the meaning of the terms "compensation" and "damages." It is also provided that if the employee, or his dependents, bring an action for the recovery of damages against such other party, the amount thereof, manner in which and the persons to whom paid, shall be as provided in part 2 of the act, and that in no case shall such third party be liable to any party other than the employee or his dependents for any such damages. The act provides that if the employee or his dependents elect to receive compensation from the employer, then the latter shall be subro-

gated to the rights of the employee or his dependents to recover against such other party, and may bring legal proceedings to recover the aggregate amount of such compensation.

The language is susceptible of but one meaning. It speaks for itself. The phrase "legal liability for damages," we think, has reference to common law liability. The act does not take from the employee or his dependents the common law right of recovery against the defendant company, if it was negligent. The case of *McGarvey v. Independent Oil & Grease Co.* 156 Wis. 580, 146 N. W. 895, is in point. In that case the supreme court of Wisconsin, in speaking of this very subject, says:

"It is conceded, as the fact is, that, in case of an employee, in the course of his employment, being injured by the actionable negligence of a third person, a statutory remedy accrues to him for compensation, against his employer and a common law remedy against such third person, though he cannot have but one satisfaction."

The jury found that there was no negligence on the part of the defendant. There being no negligence there was no common law right of action. The verdict is supported by the evidence.

Affirmed.

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## EVAN L. WORTHAM v. MINNESOTA LAND CORPORATION.<sup>1</sup>

June 20, 1919.

No. 21,281.

### Vendor and purchaser — executory contract of sale — lands included.

An executory contract for the sale of land contained a stipulation that other lands owned by the vendor might be included therein, if within a time therein stated an outstanding contract to a third person should be canceled. It is *held*, on the facts stated in the opinion, that there was no cancelation of the outstanding contract as contemplated by the parties, and that the lands therein included did not therefore become a part of plaintiff's contract.

Action in the district court for Ramsey county to recover \$16,103.23 upon an executory contract for the sale of land. The case was tried be-

<sup>1</sup>Reported in 172 N. W. 889.

fore Olin B. Lewis, J., who when plaintiff rested denied defendant's motion to dismiss the action and at the close of the testimony granted its motion to direct a verdict in its favor. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

*B. H. Scriber* and *O. S. Baylies*, for appellant.

*O'Brien, Young, Stone & Horn*, for respondent.

BROWN, C. J.

Defendant was the owner of large tracts of land in the northern part of the state, and on the fifteenth day of March, 1912, entered into an executory contract for the sale of about 9,000 acres thereof to plaintiff, for the agreed price of \$3.10 per acre. The terms of the contract were full and complete, and obligated defendant to convey the land to plaintiff upon payment of the purchase price at stated times in the future. At the date of that contract by an outstanding executory contract between defendant and the British American Land Company, a corporation, similar to that entered into between plaintiff and defendant, defendant had sold and agreed to convey to that company various tracts of land situated in Itasca county, aggregating over 6,000 acres. The contract was in the usual form of such instruments and contained provisions for the cancellation of the same, for a failure of the vendee to make the deferred payments of the purchase price at the time or times therein stated.

At the time the contract involved in this action was entered into, the parties had certain negotiations looking to the inclusion therein on certain conditions of the lands so agreed to be sold to the British American Company, and it was finally agreed that, if the British American Company contract should be canceled for default in compliance with the terms thereof within six months, the lands therein might be included in this contract upon the same or similar terms. The stipulation as finally agreed to and incorporated in the contract was as follows:

"And it is further agreed that in case any lands shall hereafter revert to the party of the first part, (defendant) within six (6) months from the date hereof, through cancellation of any contracts heretofore entered into by the party of the first part and now operative, such lands may be added to and included under this agreement, provided the same are charged for under this agreement and included at the price of \$3.10 per

acre, and such lands shall thereupon be considered as part of this agreement and subject to the same conditions as all other lands affected thereby."

The British American Company defaulted in its payments, and its manager, one Todd, indicated to defendant in some way that the company preferred not to proceed further in performance of the contract. In response to this information defendant's secretary and manager, Hoffman, on June 28, 1912, wrote the company calling attention to the default and to its indicated preference as stated by Todd not to go further with the contract, and stating that defendant therefore considered the contract void, concluding with the announcement that they would place the lands on the market for sale to other parties. The British American Company, through Todd or otherwise, made no reply to this letter, and there was no express acquiescence in the declaration thereof that defendant considered the contract void. But there were subsequent verbal negotiations between defendant and Todd, the representative and manager of the British American Company, by which he retained on behalf of his company the right to sell the lands, and by which the contract was in effect treated as still in force notwithstanding the statement in the letter referred to that defendant considered it void. The evidence in this respect is clear.

Thereafter in October, 1912, defendant, acting through its secretary and manager, Hoffman, made a sale of the lands included in the British American Company contract to one Jensen at the price of \$5 per acre. Negotiations with Jensen were commenced by an agent of defendant named Edwards in August, 1912, but the sale was finally closed by Hoffman some time in the month of October following.

On the theory and contention that there was a cancellation of the British American Company contract, and that the lands embraced therein automatically and by force of the provisions of contract above quoted became included in plaintiff's contract, plaintiff demanded of defendant subsequent to the sale of Jensen, all that was received for the lands over and above the price plaintiff was to pay under the terms of its contract. Defendant refused to recognize the claim and in February, 1918, plaintiff brought this action to recover thereon.

The facts as here outlined are fully stated in the complaint, and the



allegations to the effect that by the terms of plaintiff's contract the British American Company lands automatically became included therein upon a cancelation of that contract, and also the allegations to the effect that the British American Company contract was canceled within the six months, were all put in issue by the answer.

The cause came on for trial before the court and a jury, at the conclusion of which the court directed a verdict for defendant, and plaintiff appealed from an order denying a new trial.

Two questions are presented by the record, namely: (1) Whether the British American Company lands upon a cancelation of its contract became automatically included in plaintiff's contract without further negotiations between the parties; and (2) whether there was a cancelation of that contract within the meaning and purpose of the stipulation in plaintiff's contract.

We are not entirely agreed upon the first question, though a majority of the court are of opinion that it should be answered in the negative. But we do not discuss the question, nor dispose of the appeal on that ground, for we are all agreed that there was no such cancelation of the British American Company contract as was contemplated by the parties, and, as that conclusion disposes of the appeal on the merits, resulting in an affirmance and ending the litigation, we pass without further comment the other feature of the case.

The cancelation which the parties had in mind, and which was a condition precedent to a transfer of the British American Company lands to plaintiff's contract, necessarily was one that would put an end to the former and the rights of the British American Company thereunder, leaving defendant as free to dispose of the lands as though the contract had never been entered into with that company. Of this there can be no serious doubt. But we fail to find in the record any evidence of such a cancelation, or evidence to justify a submission of the question to the jury. There was no cancelation by notice under the statute, none by mutual consent of the parties, and the evidence will not justify the court in declaring as a matter of law that the rights of the British American Company had been fully terminated. The only evidence having any special bearing on the question is found in the statement by Todd, manager of the British American Company, that he preferred to go no fur-

ther with the contract. But his company did not surrender its rights, nor was there an abandonment of the contract by Todd, for subsequent negotiations between the parties left him free to continue his efforts to sell the land, and that situation remained until defendant sold all the lands to Jensen. The declaration of Hoffman, defendant's manager, in referring to Todd's disinclination to go further with the contract, that he, Hoffman, considered the contract void and at an end, was of no force or effect as a cancelation of the contract or the termination of the rights of the parties thereunder. His declaration in that respect was not replied to by Todd or acquiesced in by him, and, since there was no cancelation of the contract in fact, Hoffman's act in thereafter selling the lands to Jensen was a violation of the rights of the British American Company, and clearly exposed defendant to an action for damages as for a breach of its contract with that company. In fact the pleadings disclose that such an action was brought by the British American Company. But we do not consider that feature of the case, for the court excluded evidence thereof, and the matter is of no special importance. We dispose of the case upon the other ground stated, namely, that the evidence wholly fails to show a cancelation of the British American Company contract.

Order affirmed.

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STATE v. WOMEN'S AND CHILDREN'S HOSPITAL.<sup>1</sup>

June 20, 1919.

No. 21,290.

**Constitution — title of act — statute invalid.**

Chapter 212, of the Laws of 1917, providing for the protection and care of homeless children and for the regulation of societies receiving and placing them in suitable homes, and for the regulation and control of hospitals or places receiving and caring for women during confinement, is void, because it contains more than one subject.

Complaint was filed with the municipal court of St. Paul, charging defendant with operating a maternity hospital without obtaining a li-

<sup>1</sup>Reported in 178 N. W. 402.

cense in violation of the statutes. The matter was submitted to Finehout, J., upon a stipulated statement of facts, who found defendant guilty as charged in the complaint. From the judgment entered pursuant to the order for judgment, defendant appealed. Reversed.

*C. D. O'Brien*, for appellant.

*Clifford L. Hilton*, Attorney General, *James E. Markham*, Assistant Attorney General, *O. H. O'Neill*, City Attorney, and *Joseph H. Masek*, Assistant City Attorney, for respondent.

QUINN, J.

Defendant is a corporation. It was organized under the laws of this state in 1909, under the name of Women's and Children's Hospital, and since that time has been doing business in the city of St. Paul as a general hospital. It receives all classes of patients, including women during confinement. In June, 1918, William W. Hodson made and filed a criminal complaint with the municipal court of the city, charging the defendant with operating a maternity hospital without first obtaining a license therefor, as required by chapter 212, p. 301, of the Laws of 1917. Process was issued thereon and the matter was submitted to the judge of the court upon a stipulated statement of facts. The court made and filed its findings and decision adjudging the defendant guilty as charged in the complaint, and imposing a fine of \$25, from which judgment the defendant appeals.

The sole question for determination is the validity of the act under which the proceedings were instituted.

Article 4, section 27, of the Constitution provides, that every law shall embrace but one subject, which shall be expressed in its title.

The title of the act is as follows:

"An act for the protection of children who are not in the homes and under the immediate control of their parents or guardians, and for the regulation of agencies receiving such children for care or placing out, and women during confinement, and to repeal section 4050 and sections 4985 to 4992, inclusive, General Statutes, 1913."

The validity of the act depends upon whether it embraces more than one subject. We hold that it does. The body of the act, as well as its title, provides: First, for the protection and care of homeless children

and for the regulation of societies receiving and placing them in suitable homes; second, for the regulation or control of parties or hospitals receiving and caring for women during confinement. The former has to do only with homeless and abandoned children as a class, a very creditable object and one that should receive full protection from the law. The latter, which is in no way germane to the former, has to do with places where mothers from almost every walk of life are received and cared for during confinement. The rule is well settled that where the title to an act actually indicates, and the act itself actually includes, two distinct objects where the Constitution declares it shall embrace but one, the whole act must be treated as void. *Skinner v. Wilhelm*, 63 Mich. 568, 30 N. W. 311; *Trumble v. Trumble*, 37 Neb. 340, 55 N. W. 869; *Sutherland*, St. Const. (2d ed.) § 144. It appears clearly that the act under consideration embraces more than one subject and for that reason is invalid.

Judgment reversed.

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A. A. LUMPKIN v. FRED LUTGENS.<sup>1</sup>

June 20, 1919.

No. 21,312.

**Bills and notes — good faith of purchaser — verdict sustained.**

In an action on a promissory note by a purchaser before maturity, the fact that interest due annually was to his knowledge unpaid for a number of years, was a circumstance against his claim of good faith in purchasing; and that with other circumstances mentioned in the opinion sustains the verdict of the jury for the defendant.

Action in the district court for Rock county to recover \$1,600 and interest upon a promissory note and attorney's fees. The answer alleged that the note was obtained through fraudulent representations. The facts are stated in the opinion. The case was tried before Nelson, J., who at the close of the testimony denied plaintiff's motion for a directed verdict for \$2,000 and interest, and a jury which returned a verdict in

<sup>1</sup>Reported in 172 N. W. 893.

favor of defendant. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

*M. W. Chunn*, for appellant.

*C. H. Christopherson*, for respondent.

DIBELL, J.

Action on a promissory note by the assignee thereof. There was a verdict for the defendant. The plaintiff appeals from the order denying his motion for a new trial.

On June 9, 1911, the defendant Lutgens made his note to a copartnership operating under the name of the American-Canadian Land Company, for \$1,600, due on or before five years after date, payable at the company's office at Cedar Rapids, Iowa, "with interest at the rate of six per cent per annum, payable annually from date." Some time in 1911 the note was indorsed to Roach, and on June 3, 1916, he sold and indorsed it to the plaintiff for \$2,000.

It was stipulated that the note was given under such circumstances of fraud that the defendant had a defense against the payee, and that the plaintiff could recover only upon proof that he was a bona fide purchaser. The record does not present the question whether Roach was an innocent holder, through whom the plaintiff could acquire a right of recovery without proof of his own bona fides.

The land company was promoting the sale and settlement of lands in the Panhandle district of Texas. It had an office at Amarillo, Texas. The plaintiff and Roach lived there. The plaintiff was a lawyer. He was not engaged in the buying of notes, though occasionally he bought one. He knew that the land company had been dealing in Panhandle lands, settling them with immigrants from the north, that they had had some financial trouble, and that they ceased doing business several years before. He had had one or two actions against the company to foreclose vendor's lien notes on Panhandle lands. The note on its face suggested that it was given in a land transaction. He was acquainted with the men who composed the company. None of the annual interest payments had been made. There were four due when he bought, and another would become due in six days. He knew it. The testimony of the plaintiff was entirely frank and straightforward. Under the facts stated

the note was considerably in disgrace when it came to him. The fact that interest was four years' overdue was a circumstance against it. *First Nat. Bank v. Slette*, 67 Minn. 425, 69 N. W. 1148, 64 Am. St. 429; *National Bank of N. A. v. Kirby*, 108 Mass. 497; *McPherrin v. Tittle*, 36 Okla. 510, 129 Pac. 721, 44 L.R.A. (N.S.) 395; *Park v. Buxton*, 10 Ga. App. 356, 73 S. E. 557; *Merchants Nat. Bank v. Brisch*, 154 Mo. App. 631, 136 S. W. 28; *Trask v. Jacksonville, etc.*, R. Co. 124 U. S. 515, 8 Sup. Ct. 574, 31 L. ed. 521. The verdict is sustained.

In *First Nat. Bank v. Slette*, 67 Minn. 425, 69 N. W. 1148, 64 Ann. St. 429, it is held that overdue interest of itself makes a note nonnegotiable, following *First Nat. Bank of St. Paul v. County Commrs. Scott County*, 14 Minn. 59 (77), which was a suit on bonds to which unpaid interest coupons were attached. This holding is not in accord with the weight of authority. There is sufficient reason to sustain it as well as the opposite one. In view of the fact that most of the states have adopted the uniform negotiable instrument act, as has Minnesota, and the desirability of uniform holdings, we put our decision upon the ground that the evidence, considering the question as one of fact, upon which theory it was tried below, sustains the verdict, and we make no intimation that the rule stated should or should not apply.

Order affirmed.

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## STATE v. TRI-STATE TELEPHONE & TELEGRAPH COMPANY AND ANOTHER.

### STATE v. NORTHWESTERN TELEPHONE EXCHANGE COMPANY.<sup>1</sup>

June 20, 1919.

Nos. 21,840, 21,889.

**Telegraph and telephone — fixing intrastate rates — authority of Postmaster General.**

Under the authority delegated by the President to the Postmaster General pursuant to the joint resolution of Congress of July 16, 1918, 40 St. 904, c. 154,<sup>2</sup> authorizing the President to assume control of the

<sup>1</sup>Reported in 178 N. W. 856.    <sup>2</sup>[U. S. Comp. St. 1919, Supp. § 3115½x.]

telephone systems during the war, the Postmaster General in the exercise of such control had authority to fix intrastate telephone rates.

Two actions in the district court for Ramsey county to restrain defendants from continuing in force certain toll and other charges in addition to those contained in its schedules filed with the Railroad and Warehouse Commission. Plaintiff procured orders to show cause why temporary injunctions should not issue. Defendants appeared specially and objected to the jurisdiction of the court. The matter was heard before Dickson, J., who overruled the objection to the jurisdiction of the court and granted the injunctions. From the orders granting the injunctions, defendants appealed. Reversed.

*Charles M. Bracelen, Harlan P. Roberts, C. B. Randall, E. A. Prendergast, John I. Dillé and Cobb, Wheelwright & Dille*, for appellants.

*Clifford L. Hilton*, Attorney General, *James E. Markham*, Assistant Attorney General, and *Henry C. Flannery*, Assistant Attorney General, for respondent.

DIBELL, J.

Two actions, argued together, in each of which the state sought to enjoin the defendant telephone companies from putting into effect the intrastate telephone rates fixed by the Postmaster General. In each a temporary injunction was granted on January 20, 1919, and the defendants appealed.

On July 16, 1918, Congress adopted a joint resolution, authorizing the President to assume control of the telephone systems of the country during the war. 40 St. 904, c. 154. On July 22, 1918, the President assumed control and directed that it be exercised through the Postmaster General. On November 18, 1918, the Postmaster General adopted a schedule of rates, affecting intrastate business, which was different from that fixed by the Railroad and Warehouse Commission under competent authority. The putting into effect of such rates was restrained by the injunctions under review.

It was the contention of the state below that the fixing of rates was legislative in character and could not be delegated by the President to the Postmaster General; that the resolution of July 22, 1918, did not

contemplate that the government should engage in the telephone business, but that it should do no more than assume such control as was essential to its governmental operations, such as giving it priority in service and the like; and that the provision in the joint resolution providing that it should not be construed to "affect existing laws or powers of the states in relation to taxation, or the lawful police regulations of the several states" precluded the fixing of intrastate rates.

Recently the Supreme Court of the United States in *Dakota Central Tel. Co. v. South Dakota*, 250 U. S. 163, 39 Sup. Ct. 507, 63 L. ed. 910, reversing *State v. Dakota Central Tel. Co.* (S. D.) 171 N. W. 277, directly held against the position of the state. On the same day in *Northern Pacific Ry. Co. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. ed. 897, reversing *State v. Northern Pac. Ry. Co.* (N. D.) 172 N. W. 324, the court held that the government, while in possession of railroads under the act of August 29, 1916, and other acts, had authority to fix intrastate railroad rates. This case is referred to in the telephone case as controlling upon some of its features. Other cases decided on the same day, involving the same general question, are *MacLeod v. New England T. & T. Co.* 250 U. S. 195, 39 Sup. Ct. 511, 63 L. ed. 934, affirming *Public Service Com. v. New England Tel. & Tel. Co.* 232 Mass.—, 122 N. E. 567; *Kansas v. Burleson*, 250 U. S. 188, 39 Sup. Ct. 512, 63 L. ed. 926, a case of original jurisdiction in the Supreme Court; *Burleson v. Dempcy*, 250 U. S. 191, 39 Sup. Ct. 511, 63 L. ed. 929.

The holding of the Supreme Court definitely determines that the Postmaster General acted under authority properly delegated to him by the President by virtue of the joint resolution; that the specific exception in the joint resolution of lawful police regulations did not prohibit the fixing of intrastate rates, the exercise of the police power in a narrower sense being intended, and that the Postmaster General in his exercise through the President of the control of the telephone systems could fix intrastate rates.

The question is a Federal one and no question of law remains for discussion.

Orders reversed.



STATE EX REL. RADISSON HOTEL AND ANOTHER v.  
DISTRICT COURT OF HENNEPIN COUNTY.<sup>1</sup>

June 20, 1919.

No. 21,384.

**Workmen's Compensation Act — accident in course of employment — evidence.**

1. The evidence sustains the finding that an employee of one of relators met death in the course of her employment from an accident arising out of it.

**Same — dependents.**

2. Children under 16 years are conclusively presumed dependents.

**Same — who held to be orphans.**

3. Where the employee accidentally killed is the mother of several children under 16 years of age, and the father had for several years prior to her death deserted the family, such children are to be regarded as orphans, coming within subdivision 10, section 14 of chapter 209, Laws 1915, for the purpose of fixing the amount to be paid under the Workmen's Compensation Act.

Upon the relation of Radisson Hotel Company and another the supreme court granted its writ of certiorari directed to the district court for Hennepin county and the Honorable Horace D. Dickinson, one of the judges thereof, to review the proceedings in that court under the Workmen's Compensation Act brought by F. J. Hirt, guardian of the minor dependents of Vera Meakins, employee, against relators as employer and insurer. Affirmed.

*A. G. Briggs and Charles H. Weyl, for relators.*

*Sasse & French, for respondents.*

HOLT, J.

Certiorari to review a judgment in a proceeding under the Workmen's Compensation Act.

Vera Meakins was accidentally killed in Hotel Radisson, Minneapolis.

<sup>1</sup>Reported in 172 N. W. 897.

shortly after eight o'clock in the evening of November 3, 1918. She left surviving a husband and three minor children, the oldest being seven years of age. For several months prior to her death, she had been in the employ of the Hotel Radisson Company in charge of the passenger and freight elevators and the operators of the hotel. The court found that death resulted from an accident arising out of and in the course of her employment and that the three minor children were her dependents, and as conclusion of law directed judgment to be entered in favor of the respondent, the guardian of the minors, for \$11 per week for a period of 300 weeks and \$100 for burial expenses. The findings mentioned and the conclusion of law are properly challenged in this court by relators, the Hotel Radisson Company and its insurer.

The deceased was receiving at the time of her death a stipulated wage together with room and board in the hotel, amounting in all to \$80 per month. She was the starter of the elevators and usually performed that part at the entrance of the first floor, but at times directed this work from the top floor. She was also superintending the elevators in an annex adjoining the hotel, and it was her duty to observe and arrange for the hours of service of the various operators, and to examine and note whether the elevators and doors worked and closed properly. This required her at times to ride a good deal on the elevators. The immediate circumstances surrounding the accident are these:

Mrs. Meakins had attended as a starter during the day and had worn her starter's uniform, and appears to have "punched out" on the time clock at 7:50 p. m. on November 3. A few minutes after 8 she, in street attire, entered one of the elevators and rode up and down for some 15 minutes with the operator, talking to her. What they were talking about is not disclosed. As they were thus occupied, a passenger got off at the tenth floor, Mrs. Meakins followed, the operator closed the door, and was just starting to move the elevator up, when Mrs. Meakins pushed open the doors and attempted to re-enter. She tripped, the elevator was moving, and she fell back into the pit to her death.

Relators make much of the fact that deceased had "punched out" on the time clock and that she was dressed for the street, hence, it is said, the finding is not sustained that she met death in the course of her employment from an accident arising out of it. This overlooks some per-

suasive testimony given by the assistant manager of the employer, to the effect that deceased had no stated hours of work, but was practically on duty all the time, as he put it, "24 hours in the day;" that she used her own discretion as to the time within which she was to do that which was expected of her; that the wearing of a uniform was not obligatory for her, and that she was not required to punch the time clock, for her wages were not paid upon its record. The inference is near at hand that she was at the moment of the accident engaged in her work, endeavoring to ascertain whether the doors of the elevator she was riding on locked properly. It seems their defective condition in this respect was the direct cause of her death. We cannot say that the court's finding is not sustained under the rule announced in *State ex rel. Niessen v. District Court*, 142 Minn. 335, 172 N. W. 133.

The court held the children wholly dependent upon deceased. The fact was that the father of the children, the husband of the deceased, had deserted his family about three years before and had since contributed nothing to their support. The deceased and her children found a refuge with her father. She was ill for a time and unable to work. As soon as able she sought and obtained employment, the children in the meantime remaining with her father. She bought clothes for them and otherwise contributed to their support. At the time of the accident the children's father was in the army. Under the regulations of the military service, being married, he had been compelled to authorize the government to turn over a portion of his pay for the support of his family. No part thereof had been received up to the time of trial. We need not determine whether the evidence justifies a finding that the children were in fact wholly dependents, for G. S. 1913, § 8208, subd. 1, as amended by section 14, chapter 209, p. 290, Laws 1915, provides that minor children under the age of 16 years shall be conclusively presumed to be wholly dependent. The minor children thus referred to are the children of an employee accidentally killed in the course of the employment. The law does not in terms exclude the children of the female employee, and no good reason occurs to us why they should be excluded by construction. That dependents of female employees are intended to be protected by the act is clear, for a dependent husband is specifically provided for in subdivision 11 of said section 14.

The learned trial court evidently regarded the children as coming within subdivision 10 of the section just referred to which reads: "If the deceased employee leave a dependent orphan, there shall be paid forty per centum of the monthly wages of deceased, with ten per centum additional for each additional orphan with a maximum of sixty per centum of such wages." A woman may have obtained a divorce and have been awarded the care and custody of the children on the ground of the husband's misdeeds and his situation may be such that there is no hope of ever compelling him to contribute to the support of his children, or he may have deserted his family, as in this case. Is this statute to be so construed that, if the mother thus left, in an effort to earn a living for herself and children, is accidentally killed while working in an employment where the Workmen's Compensation Act applies, the children should fare worse than would be the case had their father been killed under the same circumstances and the mother had previously voluntarily without cause deserted him and the children? In the latter case the widow could get no part, and there would be no difficulty at all in holding that a fatherless child is an orphan, even though its mother is living.

An important case involving a large bequest under Girard's will is *Soohan v. City of Philadelphia*, 33 Pa. 9. The case limited the provision for "orphans" in the will to fatherless children. The opinion shows great research. Some stress is there laid upon Girard's French descent and the meaning of the word "orphan" in that language, also upon the construction the trustees of the institution, founded under this provision, had placed upon the meaning of the word and according to which the institution had been conducted for many years. In the course of the opinion it is stated that in a friendly controversy concerning the meaning of the word between John Quincy Adams and Judge Hopkinson in 1833, the former maintained that the word "orphan" includes those children who had lost both or either parent, while the latter held that the term was to be confined to those who had lost their father only. It is also stated that there was the same uncertainty of meaning in the then published dictionaries. "An orphan, in legal parlance, is a fatherless child." *Posten v. Young*, 7 Marsh (Ky.) 501. *Stewart v. Morrison's Ex'r*. 38 Miss. 419, places the same construction upon the word. However, this was held too narrow in the subsequent case of *Hall v. Wells*,

54 Miss. 289. But there can be no doubt that a fatherless child may be classified properly as an orphan. May it also mean a motherless child?

In *Friesner v. Symonds*, 46 N. J. Eq. 527, 20 Atl. 259, it is said: "An orphan is a minor who has lost one or both of his parents. This is the definition by both Bouvier and Webster. But, according to the rule prevailing in this state, it would seem that a minor is not an orphan, unless his father is dead. The court in *Heiss v. Murphy*, 40 Wis. 276, on page 291 says: "The word orphan includes a minor who has lost both of his or her parents or one who has lost only one." Black defines an orphan as "Any person (but particularly a minor or infant) who has lost both (or one) of his or her parents." Bouvier: "A minor or infant who has lost both of his or her parents. Sometimes the term is applied to a person who has lost only one of his or her parents." Webster: "A child bereaved by death of both father and mother, or, less commonly, of either parent." The Century: "A child bereaved of one parent or of both parents, generally the latter."

The decisions as well as the dictionaries, recognizing that the term orphan may properly be applied to a motherless as well as to a fatherless child, we think it meets with no difficulty of construction to hold that the minors here in question are orphans within the meaning of subdivision 10 of section 14, chapter 209, p. 291, Laws 1915. They have been deserted by their father and bereft by death of their mother, the only parent who for the last three years made any attempt to support them. The original idea of designating fatherless children orphans the same as those who had lost both parents, seems to be that the father was the head of the household and responsible for the care and support of the minors therein. When the father has abdicated that place and deserted the family, the children become indeed orphans when also bereft of their mother. The purpose of the Workmen's Compensation Law is to provide for the dependents of the employee who accidentally meets with death in the employment. To accomplish the beneficent purpose intended the law should be given a broad rather than a narrow construction.

The judgment is affirmed.

STATE EX REL. GEORGE NEIB v. MRS. FRED KRUEGER.<sup>1</sup>

June 27, 1919.

No. 21,069.

**Habeas corpus — custody of minor.**

1. Upon an appeal in habeas corpus proceedings, pursuant to section 8311, G. S. 1913, where the controversy is as to the custody of a minor, the best interests of the child are the controlling consideration.

**Same — evidence.**

2. Evidence considered and *held* to require a direction that the minor remain with his present custodian until further order.

Upon the relation of George Neib the district court for Steele county granted its writ of habeas corpus commanding Mrs. Fred Krueger to produce the body of Leonard Neib, minor son of the relator. The matter was heard by Childress, J., who granted the father the custody of his child. From that order Mrs. Krueger appealed. Reversed.

*J. A. & A. W. Sawyer*, for relator.

*J. J. McCaughey*, for respondent.

**QUINN, J.**

Appeal from an order of the district court in habeas corpus proceedings, awarding the custody of Leonard Neib, a minor of the age of 14 years, to the relator, George Neib.

The relator and his former wife, daughter of the respondent, had been married about 14 months and resided at Dodge Center when the minor, whose custody is here in question, was born. The mother died three days thereafter. The grandmother, respondent herein, then took the child to her home where he has resided ever since. Respondent owns a 12-acre lot where she resides. The family at the present time consists of a daughter who has taught school seven years, a son 25 years of age who has just returned from service across the waters, and the grandchild, Leonard. The boy has a good, clean appearance, good manners, enters the seventh grade in school this year, attends church and Sunday school

<sup>1</sup>Reported in 173 N. W. 414.

regularly, is a member of the Juvenile Band of town, assists in the work upon the 12-acre lot, and appears to be well contented with his home and surroundings.

At the time of the death of the boy's mother the relator had no home or property. Shortly thereafter he went to Dakota, but returned within a few months and within two years married his present wife to whom a daughter now 11 years of age was born. They have a little home at Blooming Prairie and the relator has a salary of \$128 per month as a rural mail carrier. He has contributed but very little to the support of his son, leaving his welfare for 14 years almost entirely to the grandmother. She proved equal to the occasion and provided well for her charge. Relator's home appears to be a very proper place for Leonard to visit, as was his custom prior to the little unpleasantness during the year 1918, and we think the boy should be encouraged to visit his father's home and cultivate a proper relation therewith.

Upon the hearing the boy was questioned by the members of this court, and his statements, when considered in connection with the testimony taken before the referee, convince us that he has a good home with his grandmother and is strongly averse to leaving the same. He appears to be a boy of good understanding and his wishes must be given just consideration. No good result would be accomplished by compelling him to leave the home with which he is entirely satisfied and by placing him with those who are comparative strangers, especially against his will.

While the legal custody of the boy is vested in the father, yet this does not compel the court to require him to leave the only home he has ever known and go to live with his parent, so long as there is a question about the betterment of his condition. *Gauthier v. Walter*, 110 Minn. 103, 124 N. W. 634. The undisputed facts have convinced us that the interests of the child will be best served by permitting him to remain with his grandmother. It is therefore ordered that the order appealed from be, and the same is, reversed, and that the respondent, Mrs. Fred Krueger, retain the care, custody and control of the minor, Leonard Neib, within the state of Minnesota, until the further order of the district court, subject to the right of the father and son to visit each other at their homes at all reasonable times and under such conditions and cir-

cumstances as may be prescribed by the judge of the district court.  
Reversed.

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G. R. ROBERTS v. EUGENE P. RING.<sup>1</sup>

June 27, 1919.

No. 21,187.

**Negligence — question for jury.**

1. Defendant, 77 years old and with defective sight and hearing, was driving an automobile on a city street. He drove over a boy of seven. The street was crowded and the boy ran from behind another conveyance. Defendant was driving four or five miles an hour. He testified that he saw the boy at a distance of four or five feet from the car. On other occasions he is alleged to have said he did not see the boy at all. His automobile passed clear over the boy. *Held*, the evidence raised an issue of fact as to his negligence.

**Contributory negligence — question for jury.**

2. The question of the boy's contributory negligence was for the jury.

**Charge to jury.**

3. The court charged the jury that, in determining the contributory negligence of the boy, they should take his age into account, and that, in determining the negligence of defendant, they might take into account his age and infirmities. This plainly meant that such facts were to be considered extenuation in both cases. This was erroneous as to defendant. When one injures others his negligence is to be judged by the standard of care usually exercised by the ordinarily prudent normal man.

Action in the district court for Steele county to recover \$20,000 for injuries to plaintiff's minor son caused by defendant's negligence. The answer alleged negligence on the part of the minor. The case was tried before Childress, J., and a jury which returned a verdict in favor of defendant. From an order denying his motion for a new trial, plaintiff appealed. Reversed.

*J. A. & A. W. Sawyer*, for appellant.

*Leach & Leach*, for respondent.

<sup>1</sup>Reported in 173 N. W. 487.



HALLAM, J.

Plaintiff brings this action on behalf of his minor son John B. Roberts, seven years old, to recover damages for injury from collision with defendant's automobile. The jury found for defendant. Plaintiff appeals. Plaintiff assigns as error certain portions of the charge. Defendant contends that the charge was without error and further contends that, as a matter of law, defendant was without negligence and that the boy was negligent.

1. Defendant was driving south on a much traveled street in Owatonna. He was 77 years old. His sight and hearing were defective. A buggy was approaching him from the south. There were other conveyances on the street. The travel was practically blocked. The boy ran from behind the buggy across the street to the west and in front of defendant's automobile. There is evidence that he had been riding on the rear of the buggy. He himself testified that he was crossing the street. As he passed in front of defendant's automobile he was struck and injured.

The question of defendant's negligence was a proper one to be submitted to the jury. Defendant was driving from four to five miles an hour, not a negligent rate of speed. If he was negligent, it was in failing to keep a proper lookout and in failing to promptly stop his car. He testified that he saw the boy when he was four or five feet from the automobile. It is matter of common knowledge that an automobile traveling four or five miles an hour can be stopped within a very few feet, yet defendant knocked the boy down and his car passed clear over him. If defendant saw the boy as he now claims, he was not alert in stopping his car. If he did not see him, as he is alleged to have stated to others, he was not keeping a sharp lookout in this crowded street. We are of the opinion that the evidence was such as to raise an issue of fact as to his negligence.

2. The question of the boy's negligence was likewise for the jury. Had a mature man acted as did this boy he might have been chargeable with negligence as a matter of law. But a boy of seven is not held to the same standard of care in self protection. In considering his contributory negligence the standard is the degree of care commonly exercised by the ordinary boy of his age and maturity. Shearman & Red-

field, Negligence, § 72a. *Hannula v. Duluth & I. R. R. Co.* 130 Minn. 3, 8, 153 N. W. 250. It would be different if he had caused injury to another. In such a case he could not take advantage of his age or infirmities.

3. The case being a proper one for submission to the jury, the question is, was it properly submitted?

In instructing the jury as to contributory negligence of the boy the court said: "A person may not go blindly across the street, especially where there is no street crossing. He must use the care which an ordinarily prudent person uses under those circumstances." Plaintiff promptly at the conclusion of the charge excepted to this language and asked the court to charge "that the care required of the boy is only such as is usually exercised by children of his age and mental capacity under similar circumstances." This the court declined to do. The charge of the court did not give the jury the proper standard of care to be applied to this boy of seven. It is true that in another part of the charge the court stated to the jury that, in determining whether the boy was negligent, they should take his age into account. If it can be said that this particular statement cured the general erroneous one, then we encounter another difficulty as follows:

As to the negligence of defendant the court charged: "In determining whether the defendant was guilty of negligence, you may take into consideration \* \* \* the age of the defendant \* \* \* and whether or not the defendant had any physical infirmities." If it can be said that the instruction that the age of the boy should be taken into consideration in determining his negligence, can be considered as an instruction that his age could be considered in extenuation of his conduct, then the same must be said of the similar instruction that they should consider the age and infirmities of the man in determining the question of his negligence. We think the charge would be so understood by a jury. As above indicated, defendant's infirmities did not tend to relieve him from the charge of negligence. On the contrary they weighed against him. Such infirmities, to the extent that they were proper to be considered at all, presented only a reason why defendant should refrain from operating an automobile on a crowded street where care was required to avoid injuring other travelers. When one by his acts or omissions causes

injury to others, his negligence is to be judged by the standard of care usually exercised by the ordinarily prudent normal man. *Powell v. Berry*, 145 Ga. 696, 89 S. E. 753, L.R.A. 1917A, 306.

Order reversed.

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VICTOR SODERSTROM v. CURRY & WHYTE,  
INCORPORATED.<sup>1</sup>

June 27, 1919.

No. 21,235.

**Workmen's Compensation Act — plaintiff not within the act.**

1. One employed by a shipper of pulpwood to load it on a vessel while moored on navigable waters at a dock in a port in this state, to be transported to a port in another state, is engaged in work of a maritime nature, and, if injured while so employed, does not come within the scope of the Workmen's Compensation Laws of this state.

**Master and servant — liability of master to dock laborer.**

2. One thus employed, if injured by reason of the actionable negligence of his employer, is not limited to the relief to which seamen are entitled under the rules of admiralty, but may recover the full damages to which he would be entitled at common law.

**Federal statute not retroactive.**

3. The amendment to the Federal Judicial Code of October 6, 1917, which extends the rights and remedies afforded by the Workmen's Compensation Laws of the several states to persons injured while employed in work of a maritime nature, will not be given a retroactive effect.

Action in the district court for St. Louis county to recover \$21,430 for injuries received while in the employ of defendant in the hold of a steamboat. Defendant interposed a demurrer to the complaint on the grounds stated in the first paragraph of the opinion. From an order, Cant, J., overruling the demurrer to the complaint, defendant appealed. Affirmed.

*Washburn, Bailey & Mitchell*, for appellant.

*Andrew Nelson and John G. Cedergren*, for respondent.

<sup>1</sup>Reported in 178 N. W. 649.

LEES, C.

Appeal from an order overruling a demurrer to the complaint. The demurrer was based on two grounds: The first, that the court had no jurisdiction of the subject of the action; and the second, that the complaint failed to state a cause of action. The court certified that the questions presented were important and doubtful. A condensed statement of the facts alleged follows:

Defendant is a Minnesota corporation dealing in and shipping pulpwood. It owns a dock at Two Harbors in this state on the navigable waters of that port, from which pulpwood is loaded into the holds of vessels plying on the Great Lakes. On July 2, 1917, plaintiff was a common laborer employed by defendant to convey pulpwood from the dock and stow it in the hold of the steamer Orion, to be transported to another state. Fourteen men were engaged in this work, plaintiff's station being in the hold of the steamer. The pulpwood was carried in dump cars to spouts extending from the dock to hatches in the deck of the steamer and was dumped from the cars through the spouts into the hold. The men in the hold could not see the cars dumped, nor could the men dumping them see those working below, and there were no means of communication between them. It was the custom to dump the cars in regular order, beginning with the hatch nearest the bow and running back to the stern. The work was in charge of a foreman stationed on the deck. While plaintiff was working under one of the hatches, the contents of a car were dumped out of the customary order and he was caught under the pulpwood and seriously injured. In support of the demurrer, defendant contends: (1) That plaintiff's sole remedy is under the Minnesota Workmen's Compensation Act; (2) that, even though it should be held that he was employed under a maritime contract, the complaint fails to state a cause of action based on a maritime right; (3) that the amendment to the Federal Judicial Code of October 6, 1917, definitely relegates him to relief under the compensation act.

Consideration of the arguments upon which the case was submitted and examination of the authorities cited in the memorandum, which the learned trial court made part of the order overruling the demurrer, together with those cited in the briefs, have led us to the conclusion that

the questions were correctly decided in the court below. We will briefly indicate our views upon them.

1. *Lindstrom v. Mutual Steamship Co.* 132 Minn. 328, 156 N. W. 669, L.R.A. 1916D, 935, would be conclusive authority for defendant, but for the fact that a year after that case was decided the Supreme Court of the United States, in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. ed. 1086, L.R.A. 1918C, 451, Ann. Cas. 1917C, 900, held that a state's workmen's compensation law cannot be extended to work of a maritime nature, because Congress has paramount power to fix and determine the maritime law of the land, and injuries sustained by one engaged in maritime work are within the admiralty jurisdiction. Since then the states have uniformly held, so far as we are aware, that the compensation laws do not apply to workmen injured while engaged in maritime work. *Doey v. Howland*, 224 N. Y. 30, 120 N. E. 53; *Duart v. Simmons*, 231 Mass. 313, 121 N. E. 10; *Georgia Casualty Co. v. American Milling Co. (Wis.)* 172 N. W. 148; *Veasey v. Peters*, 142 La. 1012, 77 South. 948.

2. In *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. ed. 760, rules were formulated applicable to all maritime contracts of employment. One of them was thus stated:

"That the seaman is not allowed to recover an indemnity for the negligence of the master or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

Counsel have referred to this as the "limited liability" rule, and it is earnestly contended that this case falls within its scope and that plaintiff was limited in admiralty to a claim for maintenance and cure. If this is true, the complaint states no cause of action, because it is framed on an entirely different theory of legal liability. We are of the opinion that the contention cannot be sustained.

Plaintiff was not a seaman and was not in the service of a ship. *Reed v. Canfield*, 1 Sumner, 195, 11 Fed. Cas. No. 11,641; *The John B. Lyon*, 33 Fed. 184; *The J. P. Schuh*, 223 Fed. 455; *The Chicago*, 235 Fed. 538; *The Buena Ventura*, 243 Fed. 797. We are unable to see why the question is not disposed of contrary to defendant's contention in *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. ed.

1208, 51 L.R.A.(N.S.) 1157. In that case the man injured was a stevedore engaged in loading a ship, and sought to recover from the owner of the ship and from the stevedore company by whom he was employed. The libel was dismissed as to the ship owner and a recovery of general damages allowed against the employer. The right to such recovery was affirmed on appeal. If Imbrovek had been a seaman, or in the service of the ship, he could have recovered only under the limited liability rule stated in the Osceola case.

*Chelentis v. Luckenbach* S. S. Co. 247 U. S. 372, 38 Sup. Ct. 501, 62 L. ed. 1171, does not change the effect of the decision in the Imbrovek case, for the reason that the injury involved was sustained by a fireman on board a ship while at sea, and obviously the rule stated in the Osceola case was applicable.

The reasons for the limited liability rule are clearly set forth in the noted opinion of Judge Story in *Harden v. Gordon*, 2 Mason, 541, 11 Fed. Cas. 6047: Men employed on shipboard are peculiarly liable to sickness and accidents from exhausting labor, change of climate and exposure to perils. Public policy requires their preservation for the commercial service and maritime defense of the nation, and so the master of the ship must care for them while disabled through sickness or accident, and the cost thereof must be borne by the ship. None of these reasons apply to men living on shore and employed at ports where ships receive and discharge their cargoes or undergo repairs. Plaintiff was not in the service of the ship when injured, was not exposed to any of the hazards referred to by Judge Story, and should not be held to come within the special rule applicable to seamen. At first blush it seems far fetched to hold that plaintiff was working under a maritime contract of employment, but such is the clear result of the decisions in the Imbrovek and Jensen cases, for there, as here, the men injured were laborers employed solely to assist in loading or unloading a ship.

The further point is made that in admiralty full compensation for injuries caused by a failure to provide a workman on board ship with a safe place in which to work is never given unless the ship was unseaworthy or there was a failure to supply and keep in order the appliances appurtenant to it. We think this point is ruled against defendant by

Atlantic Transport Co. v. Imbrovek, *supra*, where, in affirming the decision of the lower court, it was said:

"The remaining question relates to the finding of negligence. \* \* \* Both courts below, however, concurred in the finding that the petitioner omitted to use proper diligence to provide a safe place of work. \* \* \* It is sufficient to say that we are satisfied from an examination of the record that the ruling was justified."

To the same effect are *Siebert v. Patapsco S. B. & S. Co.* 253 Fed. 685; *The Satilla* (D. C.) 235 Fed. 58, 148 C. C. A. 552; *The Themistocles*, 235 Fed. 81, 148 C. C. A. 575.

3. Congress appears to have been dissatisfied with the effect of the decision in the *Jensen* case, for, a few months after it was decided, it amended the judicial code, which theretofore saved to suitors only the common law remedies which the common law is competent to give, by expressly providing that claimants should also have the rights and remedies which the Workmen's Compensation Laws of any state afford. This amendment furnishes the basis of defendant's third contention. The *Jensen* case was decided May 21, 1917. Plaintiff was injured July 2, 1917, and the amendment was passed October 6, 1917. It is contended that the amendment should be given a retroactive effect, and that plaintiff is, therefore, limited to recourse to the compensation law of this state. *Veasey v. Peters*, *supra*, sustains the contention. Apparently that case was decided on the theory that the amendment affected only the remedies which were available to plaintiff, who was injured prior to its passage. The holding could not be justified on any other ground. Either this view of the effect of the amendment was not presented for consideration in the cases decided by the courts of last resort of other states, or, if presented, it has not met with favor, for in none of them, so far as we have discovered, has it been even mentioned.

There is great difficulty in assenting to the view that only remedial rights are affected by the amendment. In our judgment it goes farther and affects the substantive rights of the parties to whom it applies. Under the law, as it stood on July 2, 1917, plaintiff had a cause of action at common law upon the facts stated in its complaint. He might recover full compensation for impaired earning capacity, loss of wages, pain suffered and the expense of medical treatment. Under the com-

pensation law, his right of recovery was much more restricted. The former right of recovery could not be taken away from him by legislation enacted after he was injured. The compensation law is not an amendment of the common law. It established new obligations between employers and employees and went far beyond mere changes in the remedies theretofore open to workmen injured by reason of negligence for which their employers were legally liable. *Duart v. Simmons*, *supra*.

It was held by the Circuit Court of Appeals for the Ninth circuit, that the Arizona Compensation Act had no application to the case of a workman injured prior to its enactment. *Arizona & N. M. Ry. Co. v. Clark*, 207 Fed. 817, 125 C. C. A. 305, and the decision was affirmed in 235 U. S. 669, 35 Sup. Ct. 210, 59 L. ed. 415, L.R.A. 1915C, 834, though on other grounds.

This court has held that the right to compensation is governed by the law in force at the date of the death of a workman and not by a subsequent amendment thereto. *State v. District Court of Ramsey County*, 132 Minn. 249, 156 N. W. 120, and, inferentially, that substantive rights arise under the act and become fixed as of the date of the injury or death. *State v. General Acc. F. & L. Assur. Corp.* 134 Minn. 21, 158 N. W. 715, Ann. Cas. 1918B, 615.

"The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury." *Chelentis v. Luckenbach S. S. Co.* *supra*.

The learned trial court was right in overruling the demurrer and the order appealed from is affirmed.

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JESSIE WESLER, AS ADMINISTRATRIX OF THE ESTATE OF  
PETER WESLER, DECEASED, v. CHICAGO, ST. PAUL,  
MINNEAPOLIS & OMAHA RAILWAY COMPANY.<sup>1</sup>

June 27, 1919.

No. 21,238.

**Death by wrongful act — contributory negligence.**

In an action for death by wrongful act, the trial court, at the close

<sup>1</sup>Reported in 173 N. W. 565.



of plaintiff's case, directed the jury to return a verdict for the defendant, upon the ground that it conclusively appeared that plaintiff's intestate was guilty of contributory negligence. Evidence examined and held to justify the instruction.

Action in the district court for St. Louis county to recover \$15,970 for the death of plaintiff's intestate. The answer alleged that deceased caused his own death through negligence and set up section 1809, subdivision 6, of the 1915 statutes of Wisconsin. The case was tried before Dancer, J., who when plaintiff rested granted defendant's motion for a directed verdict. From an order denying her motion for a new trial, plaintiff appealed. Affirmed.

*W. P. Crawford, W. A. Watts and Benj. M. Goldberg, for appellant.*  
*Abbott, MacPherran & Gilbert, for respondent.*

QUINN, J.

Plaintiff's intestate was driving an automobile south along a paved macadam highway leading from the city of Superior to Solon Springs in the state of Wisconsin. Defendant's line of railroad extends from Eau Claire to the city of Duluth, crossing the highway at about right angles. As Mr. Peter Wesler, the deceased, approached the crossing, he brought his automobile to an almost full stop at a point within a few feet of the track, then shot ahead as if in an endeavor to cross it ahead of a rapidly approaching locomotive. The locomotive struck the automobile, carrying it several hundred feet to the west and killing the occupant almost instantly. This action was brought to recover for his death. At the close of plaintiff's testimony the court directed a verdict in favor of the defendant because of the contributory negligence shown on the part of deceased. Whether the deceased was guilty of more than slight negligence is the sole question here for consideration.

It appears that the highway referred to is the main traveled road between Duluth, Superior and Solon Springs; that it is paved with macadam to the width of about 12 or 14 feet; that, for about three miles before reaching the railroad going south, there is a heavy up-grade, which materially increases from the north side of the right of way to the track. The railroad track has a descending grade from the east to the west at that point. At about 10 o'clock in the forenoon of the day in question,

Frank J. Kenyon was driving a Maxwell car on this highway going south toward the crossing referred to. Gust Holm and J. K. Smith were riding in the rear seat of his car. These three men were the only persons who saw the accident who testified upon the trial.

Mr. Kenyon overtook Wesler about 80 rods north of the railroad crossing. Wesler was driving slowly and Kenyon undertook to pass him, but was prevented, and he trailed along four or five rods behind until they approached the railroad. As Wesler approached the crossing he slowed down his car, and when within a few feet of the track brought it to an almost full stop. His car then suddenly spurted ahead and the locomotive, backing down from the east at a speed of from 40 to 50 miles per hour, struck Wesler's car squarely in the side, carrying it several hundred feet to the west and killing the occupant almost instantly.

Mr. Kenyon testified in substance that he lived at Superior and was familiar with the locality of the railroad crossing; that as he approached the right of way he heard a rumbling noise and knew a train was coming; that the wind was from the southwest and that he could not tell from what direction the train was approaching; that he saw Wesler slow down his car to an almost full stop when within about six or seven feet of the track; that he then saw the car shoot ahead, and the tender of the locomotive struck it squarely in the side; that the witness stopped his car near the edge of the right of way about 25 feet north of the track at about the same time that Wesler slowed down his car; that he then saw the locomotive approaching at a point about 10 or 15 rods east of the crossing; that on account of the view being obstructed by trees one could not see down the track until within about 25 feet of the crossing; that about 80 rods east of the crossing the track curved to the south so that the view was obstructed beyond that point; that he heard the train approach when he was about 100 to 150 feet north of the track, and that he did not hear the bell or whistle sound as the engine approached.

The testimony of the other two witnesses to the accident corroborated Kenyon. It is apparent that, from the point where the highway intersects the right of way, one sitting in an automobile could see a train coming from the east for a distance of at least 300 or 400 feet. Kenyon's car had reached this point at the time Wesler slowed down his car from a speed of about five miles per hour to what appeared to be an al-

most full stop to those who witnessed the affair. Then the car shot ahead onto the track immediately in front of the locomotive. Mr. Kenyon testified:

"A. I should not imagine he was going over five miles an hour. He was going very slow until he took that just a little sudden spurt.

"Q. About where was the car at the time he gave it the spurt you speak of?

"A. Why, it looked to me not over five feet from the railroad.

"Q. You mean five feet from the rails?

"A. Yes, from the rails."

The witness Holm testified that there was a raise in the highway from the north line of the right of way to the railroad track of about five or six feet; that Wesler's car moved up that pitch slowly, and when within five or six feet of the track came nearly to a stop and then seemed to pick up speed again; that, as it was getting on the track, he, Holm, saw the engine about 100 feet away. The conclusion of the trial court seems to be inevitable.

We have not overlooked section 1809 of the Wisconsin statutes for the year 1915, which was pleaded and admitted, and provides that "slight negligence is no bar to recovery for personal injuries."

Affirmed.

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NATIONAL ELEVATOR COMPANY v. CHICAGO, MILWAUKEE  
& ST. PAUL RAILWAY COMPANY.<sup>1</sup>

June 27, 1919.

No. 21,340.

**Carrier — switching charges — change in tariff.**

1. A schedule of rates published and filed by a railroad company, providing for the absorption by the company of the switching charges of connecting carriers at the destination of shipments, where, under its schedules of rates theretofore published and filed, the shipper was required to pay such charges, is a change in an existing tariff and not a "first instance" tariff within the meaning of chapter 176, Laws 1905.<sup>2</sup>

<sup>1</sup>Reported in 173 N. W. 418.    <sup>2</sup>[G. S. 1913 §§ 4290-4297].

**Reduction in tariff — consent of R. & W. Commission.**

2. A change in the tariffs of a railroad company, voluntarily made, reducing rates to all shippers on all commodities, at all stations in this state, becomes effective without obtaining the consent of the Railroad and Warehouse Commission in the manner provided by chapter 176, Laws 1905.

**Restoration of original rate.**

3. After such a change has been made, the original rate cannot be restored without the consent of the commission after a hearing upon notice; a finding that the reinstatement of such rate will be a fair and reasonable change in rates, and an order or other action on the part of the commission sanctioning the change.

Action in the district court for Hennepin county to recover overcharges collected by defendant for switching charges on three carloads of grain. The case was tried before Hale, J., who made findings as set out at the beginning of the opinion and as conclusions of law found that defendant had the right, without obtaining the approval of the Railroad and Warehouse Commission and without any hearing to interested parties, to file with the commission Supplement No. 46 to its tariff G. F. D. 48,181, in terms effective December 18, 1906; that the tariff became effective on the date last mentioned and had ever since remained in full force and effect and was effective in fixing the lawful charges to which defendant company was entitled for the movements of the carloads of grain specified in paragraphs 17, 18 and 19; that the mere filing by defendant with the commission of subsequent tariffs containing changes in the rule contained in Supplement No. 46 and obtaining receipts therefor was not a compliance with the provisions of chapter 176, Laws 1905, and each and all tariffs so filed and purporting to make any such change were unlawful and never became effective, and ordered judgment in favor of plaintiff for \$4.50. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

*F. W. Root, Nelson J. Wilcox and J. N. Davis, for appellant.*

*Lancaster & Simpson, Harold G. Simpson and Frank J. Morley, for respondent.*

**LEES, C.**

This action was brought to recover switching charges paid by plaintiff

on three carloads of wheat which it shipped over defendant's line of railroad from Wheaton in this state to Minneapolis. A recovery was allowed after a trial by the court without a jury and this appeal was taken from the judgment.

The court found that plaintiff had an elevator at Wheaton, from which it shipped grain to Minneapolis and other terminal markets. Defendant is the only railroad company having a line at Wheaton. Prior to April 14, 1905, it had published and filed with the Railroad and Warehouse Commission of this state a tariff applicable to shipments of grain from Wheaton to Minneapolis, which contained no provision relative to the switching charges of its connecting carriers at Minneapolis.

On September 19, 1906, it published and filed with the commission a tariff, which provided in effect that switching charges on carload shipments from competitive points were included in the rates on such shipments or "absorbed."

On November 15, 1906, it published and filed another tariff providing for the absorption of such charges on carload shipments from all points in the state, whether competitive or noncompetitive, if its minimum net earnings were \$15 per car.

Thereafter and prior to January 21, 1907, and effective on and after that date, it published and filed a tariff, naming the rates on intrastate shipments of grain, and providing that freight transported thereunder should be subject to the printed regulations relative to switching charges and the absorption thereof.

On January 28, 1907, it published and filed a tariff containing the following provision: "Rates named herein and in tariff as amended on grain to Minneapolis, Minnesota, do not include connecting line switching charges when shipments are for delivery on connecting lines."

On November 5, 1907, it published and filed a supplement to its tariffs, reading as follows: "Unless otherwise provided, rates named in tariff do not include connecting line switching charges when for cleaning houses, elevators or mills located on connecting lines at Minneapolis, Minnesota."

On April 14, 1905, chapter 176, p. 225, Laws 1905, became effective. The portions thereof which concern this case read as follows:

"Section 1. All common carriers subject to the laws of this state shall

have the right, in the first instance, to prescribe and publish, as required by law, all classifications and tariffs, rates and charges, together with rules governing the same. \* \* \* This act shall include all terminal and switching charges. There shall be but one classification, which shall be uniform on all the railroads in this state, and shall govern in all state commerce."

"Sec. 3. The schedule of rates and charges for the transportation of freight and cars, together with the classification of such freights, minimum weights and rules now in effect, and all rates, charges and classifications published by any common carrier after the passage of this act, shall be deemed just and reasonable and shall not be changed except upon the order of or by the written consent of the Railroad and Warehouse Commission."

"Sec. 5. Any common carrier desiring to change or discontinue any published rate, charge \* \* \* or rule governing the same, to which it is a party, shall make application to the commission in writing, stating the changes \* \* \* desired, giving the reasons for such change. Upon receiving such application, the commission shall fix a time and place for hearing, and give such notice to interested parties as it shall deem proper and reasonable, and after hearing all the evidence offered, if the commission find that it is reasonable, fair and just to both shippers and carriers that the change should be allowed as asked for, it shall grant the application; otherwise it shall deny the same."

After the passage of this act, it was the practice of the commission, when a new tariff was filed, to cause it to be checked over by clerks in its office. If no change in existing rates or rules was contained therein, it would send the carrier a written acknowledgment of the receipt of the tariff. If changes were discovered, the receipt was withheld, and the carrier notified that they were not approved and required to make application in writing for leave to make them. At times clerks checking up a tariff would fail to discover changes in it, and would file and receipt for it without calling the attention of the commission to the change.

Each of the tariffs to which reference has been made were stamped "filed," with the date of filing, and receipt thereof was acknowledged. The commission never approved of any of the changes set forth in these tariffs, and no application in writing was ever made for leave to make

them. There was no hearing upon and no order authorizing the proposed changes.

The shipments involved here were made during the year 1912, and defendant's net earnings thereon exceeded \$20 per car. Each car was delivered by defendant to a connecting carrier at Minneapolis. Such carrier switched one car to a flour mill and one to a grain elevator, where each was unloaded. The third car was switched to an elevator and the wheat disposed of in some manner not disclosed by the evidence. These three shipments were selected as typical of the manner in which grain shipped to Minneapolis is usually handled. In each case the switching charges of the connecting carrier were added by defendant to its charges for the line haul from Wheaton to Minneapolis and collected from plaintiff.

The sole question is whether defendant was bound to absorb these charges.

1. Before the Act of 1905 became effective, the statute provided that there should be but one terminal charge for switching a car within the limits of any municipality, and that, if the car must pass over the tracks of more than one railroad therein, the company first switching it should receive the entire charge for that service, and make an equitable division thereof with the other company. It required carriers to print schedules of rates for public inspection, setting forth separately the terminal charges and any regulations that would change their aggregate rates and charges. They were required to file copies of the schedules with the commission and to notify it of all proposed changes therein. R. L. 1905, §§ 2012, 2013, 2014 and 2016. In compliance with the statute, defendant had filed its schedules of rates. They contained no provision for the absorption of switching charges. By the first tariff filed after the Act of 1905 took effect, it reduced its rates by discontinuing switching charges on shipments from competitive points; and, by the second, by discontinuing such charges on shipments from noncompetitive points, if its net earnings on a car were \$15.

Defendant argues that these were changes in its rates under its schedule filed with the commission prior to 1905. Plaintiff asserts that they were "first instance" rates, within the meaning of section 1 of the Act of 1905, and might be put into effect without the consent of the commis-

sion. We are of the opinion that plaintiff's position is untenable, and that the new tariffs did bring about a change in rates. But the change was voluntarily made and reduced the rates to all shippers on all commodities at all railroad stations in the state. That such a change may be made without the consent of the commission was taken for granted when *Steenerson v. Great Northern Ry. Co.* 60 Minn. 461, 62 N. W. 826, was decided. We quote from the opinion in that case. Referring to the statute under consideration there, it was said:

"We are of the opinion that the 'no higher, no lower,' feature of the subdivision (of the statute) is capable of but one construction. It was not the intention of the legislature to prohibit carriers from making reductions in tariffs at will, providing such reductions were uniform,—what are frequently called 'horizontal reductions.' This provision was designed, evidently, to thwart every attempt to evade the law or an order made under it by the raising of rates \* \* \* changing of classifications at some stations \* \* \* or to the detriment of some persons \* \* \*. The result of such raising or lowering would be to unjustly discriminate as between persons and places, and this the statute will not tolerate."

By the act under consideration in the *Steenerson* case, it was made unlawful for a carrier to maintain a higher or a lower rate than that fixed by the commission, unless a court had decreed otherwise, while by the Act of 1905 changes in rates were prohibited, unless the consent of the commission was obtained. We attach no importance to the difference in the phraseology of the two acts. To prohibit the raising or lowering of a rate is equivalent to prohibiting a change of rates. Defendant contends that the portion of the opinion we have quoted was purely obiter, and that, as a statement of the law, it is fundamentally unsound. We do not so regard it.

Legislation affecting rates charged by common carriers has two principal ends in view: The first, to prevent the carrier from charging excessive rates; the second, to prevent discriminatory rates as between different shippers, different localities and different commodities. That these were the ends sought to be accomplished by the Act of 1905 becomes apparent when it is read as a whole and the conditions which then existed quite generally are taken into account. On no possible hypothesis



can it be said that a general horizontal reduction of rates on all commodities may be detrimental to the public, and ought not to be made without the consent of the commission as the representative of the public. Such a reduction was accomplished by the publication and filing of the two tariffs relating to the absorption of switching charges. We hold that they became effective without the consent or approval of the commission.

2. After defendant's rates had been reduced, they could not be advanced by restoring the old rates without complying with the provisions of section 5 of the Act of 1905. The same steps were taken by defendant on filing each of its several tariffs. We have already pointed them out. The court found that they were not such a compliance with the statute as is required. It appears that there was no hearing before the commission; that no notice was given to the interested parties; that there was no finding by the commission that the proposed reinstatement of the original rule as to switching charges was fair and reasonable, and that there was no order by or action on the part of the commission which sanctioned the change. *Berwind-White C. M. Co. v. Chicago & Erie R. Co.* 235 U. S. 371, 35 Sup. Ct. 131, 59 L. ed. 275, is cited by defendant to the point now under consideration. In that case it was held that the filing with the Interstate Commerce Commission of a book of rules relating to demurrage was a sufficient compliance with the Federal Act to regulate commerce, which required tariffs of interstate carriers to be filed and published. An examination of the Act of Congress discloses an entire absence of the specific provisions for a hearing after notice and for affirmative action by the commission upon an application for a change of rates, which are contained in section 5. We think the mere filing of its tariffs with the commission was not a compliance with the requirements of the act and that the finding of the learned trial court to that effect is correct. *Bell Lumber Co. v. Great Northern Ry. Co.* 135 Minn. 271, 160 N. W. 688.

It is to be noted that the changes in the tariffs of January 28 and November 5, 1907, affect only shipments of grain to Minneapolis. The effect of these changes was to make the rates on grain shipped there higher than they were at other places in the state. It is also to be noted that on all commodities shipped to Minneapolis, except grain, the switch-

ing charges were to continue to be absorbed. Upon their face, the changes appear to be discriminatory. There may have been valid reasons for making them, but we think they should have received the approval of the commission in the manner directed by the statute before they became effective.

Judgment affirmed.

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IN THE MATTER OF THE APPEAL FROM THE ORDER OF  
THE COUNTY BOARD OF MEEKER COUNTY MADE  
AUGUST 9, 1916, ORGANIZING SCHOOL DISTRICT NO. 58.

INDEPENDENT SCHOOL DISTRICT NO. 47 OF MEEKER  
COUNTY AND OTHERS v. MEEKER COUNTY.<sup>1</sup>

June 27, 1919.

No. 21,266.

**School district — detachment of territory — testimony of commissioners  
admissible.**

The board of county commissioners, on petition, detached certain territory from a school district formed in 1911 by two districts uniting. Upon appeal the order of the county board was reversed. It is *held*:

(1) Under the rules governing the trial of such appeals, the evidence did not warrant the court in finding that the board acted arbitrarily, unreasonably or against the best interests of the people in the territory affected, unless it was proper to receive and consider the testimony of two members of the county board, by whose affirmative vote the territory was detached, that they so voted because of the belief that the union of the two districts in 1911 was void and illegal.

(2) The union of the two districts was an accomplished fact, and the members of the county board and the judge of the district court were bound to consider the same as valid, as if all the formalities required by law in the consolidation of school districts had been complied with.

(3) The testimony of the two members of the county board was admissible and warranted the finding made by the trial court.

From an order of the board of county commissioners of Meeker county, granting a petition to form a new school district out of territory sit-

<sup>1</sup>Reported in 173 N. W. 850.

uate in district No. 47, Alfred C. Peterson and others, as members of the board of education of Independent Consolidated School District No. 47, and the school district, appealed to the district court for that county on the grounds that the county board had no jurisdiction to act, that it exceeded its jurisdiction, and that the action was against the best interests of the territory affected. The appeal was heard before Daly, J., who made findings and ordered judgment reversing the order of the county board. From the order denying its motion for amended findings or for a new trial, defendant appealed. Affirmed.

*Raymond H. Dart, F. E. Latham and C. A. Pidgeon, for appellant.*

*T. O. Gilbert and J. M. Freeman, for respondents.*

HOLT, J.

The board of county commissioners of Meeker county on August 9, 1916, detached certain territory from School District 47 and formed it into District 58. Upon appeal to the district court the board's order was reversed, the court finding that the board acted arbitrarily and in disregard of the best interest of the territory affected, and that the order works a manifest injustice to the people residing in the whole territory, particularly to those residing in what now remains of District 47. The petitioners for District 58 appeal.

The School District 47, as conducted since 1911, comprised a little over 11 sections of land, located substantially in a square, with the village of Dassel immediately west of the center line and in the southern part of the square. The five sections lying east of a line drawn north and south through the center of the territory comprise what was formed into District 58 by the action of the board. It appears that for some time prior to 1911 there had been a School District 58, embracing the same territory detached by the board in 1916. In it there was and now is an ordinary, comfortable, one room country district school house. In 1911 District 47 possessed a modern brick school building with adequate rooms and equipment, in which was conducted a full grade and high school with all the latest courses, such as domestic science, manual training, agriculture et cetera. An agitation was then started to induce District 58 to join or consolidate with 47. The result was that District 58 held a meeting, and by a majority of its voters determined to unite with

47. The two school houses are about one and a half miles apart by road. From that time on the officers of the county and of the school district mentioned treated the matter as if a legal consolidation had been fully and effectively carried out. So did the voters, and School District 47 was regarded as embracing what were before Districts 47 and 58. The school house in 58 was not thereafter used for school purposes.

Some time after the districts united, bonds were voted to erect a substantial addition to the school building in Dassel. This was done, so that now the school house contains 22 rooms. The school at Dassel was carried on, but the residents of the former District 58 became dissatisfied with the bus service and the increased taxation going with the maintenance of an up-to-date school, and, by unanimous petition, asked to be detached. A hearing was had before the board, at which both the officers of District 47 and the petitioners appeared personally and by counsel, with the result above stated. On the trial of the appeal in the district court the evidence covered a wide range. Considerable testimony from practical educators was introduced as to the advantages of a school of the kind maintained in District 47 over the one that is or can be conducted in 58; the taxable value of the property in the respective districts was proven; the manner in which the bus service had been carried on, and the condition of the roads were fully gone into; the location of the homes with reference to roads over which the bus could travel and the exposure of the children to the elements, while waiting for the bus at some distance from shelter to pick them up, were shown. It was also proven in the trial that two of the members of the county board voted against detaching District 58, and that two of the three who voted in favor of granting the petition did so chiefly on the ground that they were of the opinion that the union of the two districts in 1911 was illegal.

From the standpoint of the educational advantages there can be no reasonable doubt but that the best interest of the people in the whole territory affected will be subserved by keeping District 47 intact. And if the district court had had the power to try the matter *de novo*, or had had the right to exercise his own judgment as to the propriety of detaching or refusing to detach District 58, the correctness of his conclusion could not be questioned that judgment should be entered reversing the

action of the county board. But, according to the settled rule in this state, the scope of the court's inquiry is limited. The county board acted in a legislative capacity in detaching District 58. The court could not so act in determining the appeal. The limitation of the inquiry has been fully stated and discussed in the late cases of *Farrell v. County of Sibley*, 135 Minn. 439, 161 N. W. 152; *Hall v. Board of Co. Commrs. of Chippewa County*, 140 Minn. 133, 167 N. W. 358; and *Common School District No. 85 v. Renville County*, 141 Minn. 300, 170 N. W. 216. It was within the province of the board of county commissioners to determine whether the educational advantages to be obtained in the Dassel school outweighed the dangers, difficulties and expense the people of District 58 would have to be subjected to in order to continue their relations with District 47. It was not within the province of the trial court so to do. The creation of school districts and changing their boundaries are purely legislative and administrative questions and problems of government which courts do not determine and do not interfere with or review, except as especially empowered. Under the view of the law above stated a majority of the court are of the opinion that, aside from the testimony of the members of the county board, received over the objections of the petitioners, the evidence did not warrant the court in reversing the order of the board.

Preliminary to considering the errors based upon the reception of the testimony of the members of the board, it may be stated that at the hearing before the board of county commissioners, as well as upon the trial in the court below, there appears to have been much contention over the status of School District 47, the petitioners claiming that the union in 1911 was illegal and void, and therefore they had an absolute right to be separated, regardless of other considerations. There may have been informality in the proceeding by which the two districts united, but for several years the people in the territory concerned treated the union as an accomplished fact, so did the school, county and state officials, and we think both the county board and the trial court were bound to regard the status of School District 47 as if the union in 1911 had been effected in accordance with all the formalities prescribed by law.

We then come to the question of the admissibility and effect of the testimony of the two members of the board who voted in favor of de-

taching District 58 because they believed the union of the two districts illegal.

In a collateral attack upon the order of the board, we are agreed that it would not be permissible for members to impeach the record, or the order, by showing that they voted under a mistake of law or fact. But on appeal from the order the attack is direct, and the scope of the inquiry goes to a consideration of the reasonableness of the order. Appellant contends that the board acts in a legislative capacity in changing school districts, hence the same rules as to admissibility of evidence as to the motives or reasons for their vote apply as do apply to members of a legislature. It is beyond question that legislators may not be called to impeach a law by showing that their vote in favor of its passage was induced by an erroneous opinion of the validity of that or any other law, or by a mistake of fact.

The analogy is not the same. When a law is passed by the requisite vote, the courts must accept it as valid, regardless of the motives or reasons that prompted those who voted for its passage, unless violative of some constitutional provision. But here the statute has given the court express authority to review the action of the board and determine whether it acted arbitrarily, unreasonably or fraudulently. The board's action was the result of the vote of the majority of the members thereof. Whenever the motive or reason for a person's act is a direct issue, he may, according to the rule generally accepted, testify thereto. We find that in this state, where the actions of boards or persons charged with the duty of determining assessments are for judicial review, the persons who acted or who knew on what theory action was taken have testified. The clerk of the board testified in *City of Duluth v. Davidson*, 97 Minn. 378, 107 N. W. 151. In *State v. District Court of Ramsey County*, 95 Minn. 503, 510, 104 N. W. 553, the members of the assessment board testified to their reasons for making the assessment. In *State v. Judges Dist. Ct. Eleventh Judicial Dist.* 51 Minn. 539, 53 N. W. 800, 55 N. W. 122, the paper book discloses that a member of the board making the assessment under review by the court, as well as the clerk of the board, testified as to the methods and the reasons for making the same. A majority of the court think the evidence of the two members of the boards admissible.

This is neither a collateral attack upon the order of the board, nor is

it a direct attack by independent suit, but it is a review of the order in the proceeding where it was entered, and is provided for by statute. There are authorities that persons acting as members of equalization or assessment boards may not be called to impeach their action in direct suits brought for the purpose of setting aside tax judgments. *Boston & M. R. v. State*, 76 N. H. 86, 79 Atl. 701, and *Chicago, B. & Q. Ry. Co. v. Babcock*, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. ed. 636. The majority considers that the principles stated in those decisions should not be extended to a review of the action of the board of county commissioners upon an appeal of the sort provided for in section 2677, G. S. 1913.

The evidence referred to being admissible, there can be but little doubt that the trial court could on the strength thereof readily find the order of the board unreasonable and arbitrary. For clearly the order would not have been made but for the erroneous theory upon which the two of the three members who recorded their vote in favor of the order proceeded. For this reason we think the learned trial court's conclusion should stand.

Order affirmed.

HALLAM, J. (concurring).

I concur.

My opinion is that the testimony of the members of the board was properly received and that, taking all the testimony into consideration, the finding of the trial court should be sustained. I have no opinion as to what the result would be if part of the testimony were eliminated.

BROWN, C. J. (dissenting).

I dissent.

A fruitful field of judicial investigation into legislative proceedings is opened up by the decision in this case to which I am unwilling to assent.

It is elementary law in this country that the legality and validity of legislative enactments and proceedings, in the absence of defects appearing on the face of the record, are conclusively presumed and judicial inquiry to the contrary is not permitted. The motives or reasons controlling the action of members of the legislative body cannot be challenged in the courts, nor the result of their deliberations set aside by judicial

decree on extraneous disclosures of mistake or misunderstanding of law or fact on their part. 2 Lewis-Sutherland, Stat. Const. § 496; State v. City of Lake City, 25 Minn. 404; Wright v. Defrees, 8 Ind. 298; People v. Shepard, 36 N. Y. 285; People v. McElroy, 72 Mich. 446, 40 N. W. 750, 2 L.R.A. 609; Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. ed. 1145. The rule applies to local municipal councils and boards properly clothed with the performance of legislative functions and duties, as well as to the state legislature. 2 McQuillin, Municipal Corp. § 703; Lilly v. City of Indianapolis, 149 Ind. 648, 49 N. E. 887; 1 Dillon, Municipal Corp. § 311 (5th Ed. § 580). It precludes inquiry into the motives of the legislative members, either by the state or at the suit of a private party. 2 Lewis-Sutherland, Stat. Const. § 496; Wright v. Defrees, 8 Ind. 298; McCulloch v. State, 11 Ind. 424. The attempt of the court in this case to distinguish between a direct and collateral attack finds no support in the authorities.

The matter of organizing or consolidating school districts, or setting off territory from an existing district, is purely legislative under the Constitution and laws of this state, and may safely be left to the legislative tribunals to which it is referred by law, subject to judicial interference only to the limited extent heretofore stated in our decisions. Hall v. Board of Co. Commrs. of Chippewa County, 140 Minn. 133, 167 N. W. 358. Such is the character of the proceeding involved in this case, and the decision of the court presents an extraneous judicial attack upon the order of the local board on the ground of an alleged misunderstanding by some of the members thereof in respect to the validity of a prior proceeding involving the same school district. The case comes clearly within the rule prohibiting judicial interference.

The tax and special assessment cases cited in the opinion of the court, involving as they do private rights and private interests, are not in point. The controversy in this proceeding involves public interests only, is wholly legislative in substance and results, to which all private rights are subordinate and must yield.

Justice Quinn joins in the above dissent.



**E. J. PELKEY v. NATIONAL SURETY COMPANY AND  
ANOTHER.<sup>1</sup>**

**June 27, 1919.**

**No. 21,289.**

**Injunction — action on bond — recovery of counsel fees.**

1. When the sole purpose of an action is to secure a permanent injunction, and a temporary injunction giving substantially the relief prayed is issued and remains in effect during the pendency of the action, and judgment is rendered in favor of the defendant, the reasonable value of counsel fees incurred in defending the action is recoverable in an action on the injunction bond.

**Same — bar to action.**

2. In an action on an injunction bond the defendants cannot relitigate the merits involved in the action for an injunction; and where the action was to enjoin the maintenance of an ice house and the carrying on of an ice business on certain premises, an order of the city inspector of buildings made about the time of the commencement of the action directing the tearing down of the ice house is not a bar to an action on the injunction bond.

**Eminent domain — due process of law — order of municipal officer.**

3. If the defendants in the action on the bond can avail themselves of the order of the building inspector as bearing upon the question of damages, the validity of the order is subject to attack by the plaintiff. An order of a municipal officer or board, in the exercise of a police power, restricting the use of property or ordering its destruction may not amount to the taking of property without due process and the owner may not be entitled to an injunction, but at some time and in some way he is entitled to have determined in a judicial proceeding the rightfulness of the taking or destruction.

**Damages — evidence.**

4. The plaintiff sustained some damage, aside from counsel fees incurred, by reason of the injunction. Whether his evidence shows any loss of profits is in doubt, and if there was a loss it was small.

**Action in the district court for Hennepin county to recover \$2,000 on**

<sup>1</sup>Reported in 178 N. W. 435.

an injunction bond. Among other matters the answer alleged that the building in which ice was stored was duly reported by the inspector of buildings as unsafe to be used for the purpose of storing ice and that in December, 1916, and again in January, 1917, he duly made and caused to be made further examinations of the building and found as a fact that the same and particularly the walls thereof were in a dilapidated and dangerous condition, and that the building itself, or what remained thereof, was unsafe for the purpose for which it was intended and used. The case was tried before Jelley, J., who at the close of the testimony denied plaintiff's motion for a directed verdict and granted defendants' motions for directed verdicts. From an order denying his motion to set aside the verdict and for a new trial, plaintiff appealed. Reversed.

*George S. Grimes and Jesse Van Valkenburg, for appellant.*

*C. A. & V. C. Pidgeon and Benton & Morley, for respondents.*

**DIBELL, J.**

This is an action on an injunction bond. A verdict was directed for the defendants at the close of the testimony. The plaintiff appeals from the order denying his motion for a new trial.

1. On January 11, 1917, Clara Holzschuh, now deceased, of whom the defendant Richard P. Holzschuh is the administrator, commenced an action against the plaintiff Pelkey to permanently enjoin him from storing ice and carrying on an ice business upon certain premises in Minneapolis. Upon order to show cause a temporary injunction was issued on March 6, 1917. The trial resulted in a judgment on the merits for Pelkey. This action is on the injunction bond given by Mrs. Holzschuh with the defendant National Surety Company as surety.

The plaintiff seeks to recover as one item of his damages the reasonable value of the services of his counsel in defending the action. It was held that he was not entitled to recover counsel fees. The bond is "conditioned for the payment to the party enjoined of such damages as he shall sustain by reason of the writ, if the court finally decides that the party was not entitled thereto." G. S. 1913, § 7891. An action on the bond is the only remedy of the party enjoined, unless there be malice.

Hayden v. Keith, 32 Minn. 277, 20 N. W. 195. The right to damages depends upon the construction of the bond.

By the temporary injunction it was directed "that pending the final determination of said cause and the judgment of the court therein, the defendant, his agents, employees and servants refrain from filling, storing and keeping ice upon the above described premises, except such as was placed thereon prior to the commencement of this action, and from carrying on the business complained of in the complaint herein."

The prayer of the complaint was "that defendant, his agents and employees, be forever restrained and enjoined from storing ice in or upon said premises and from carrying on an ice business upon and from said premises." And there was a prayer for a temporary injunction which was issued in the form quoted above.

The purpose of the action was to obtain a permanent injunction restraining Pelkey from making the designated use of this property. There was no other. Nothing else was wanted. It was distinctly an action for an injunction and not an action to which an injunction was incidental. It is held upon good authority that when the temporary injunction is ancillary to the main action counsel fees incurred in defending such action are not recoverable in an action on the injunction bond. Lamb v. Shaw, 43 Minn. 507, 45 N. W. 1134, is such a case. But where the sole purpose of the action is to obtain a permanent injunction counsel fees incurred in defending the main action are by like good authority damages within the terms of the injunction bond. Weierhauser v. Cole, 132 Iowa, 14, 109 N. W. 301, and cases cited; Loofborow v. Shaffer, 29 Kan. 415; Raupman v. City of Evansville, 44 Ind. 392; Bush v. Kirkbride, 131 Ala. 405, 30 South. 780; Jackson v. Millsbaugh, 100 Ala. 285, 14 South. 44; Curry v. American, etc., Co. 124 Ala. 614, 27 South. 454; Jamison v. Dulaney, 74 Miss. 890, 21 South. 972. A good collection of cases is found in a note in 16 L.R.A.(N.S.) 49, 69. And see note 8 Ann. Cas. 715; 13 Ann. Cas. 262; Ann. Cas. 1912D, 715; 1 Joyce, Inj. § 203; 22 Cyc. 1053.

The cases are not in harmony, but Nielsen v. City of Albert Lea, 87 Minn. 285, 91 N. W. 1113, brings the case before us within the doctrine stated. A plaintiff who seeks a permanent injunction only, and can get and takes a temporary injunction giving him the same relief temporarily,

is much in the position of one taking execution before judgment, and if he fails to get a judgment it is not harsh that he be required to pay the damage he has caused. There is nothing strained in holding, as is held in the line of cases cited above, that the value of services of counsel in defending the main action is an item of damage within the terms of the bond, and a contrary construction is permissible. The plaintiff is entitled to recover the reasonable value of the services of his counsel in defending the main suit.

2. On January 15, 1917, the building inspector of Minneapolis served notice on Pelkey to tear down his building and remove the débris. This order was made under authority of an ordinance of the city. The record does not show that anything further was done. The defendants now claim that this order is a bar to an action on the bond. We think this is not so.

In a suit on the injunction bond the plaintiff in the injunction suit cannot relitigate the matters there involved. *Terre Haute & I. R. Co. v. Peoria, etc.*, R. Co. 182 Ill. 501, 55 N. E. 377; *Nansemond Timber Co. v. Rountree*, 122 N. C. 45, 29 S. E. 61; *Revell v. Smith*, 25 Okla. 508, 106 Pac. 863; *Fullerton v. Pool*, 9 Wyo. 9, 59 Pac. 431; *Sipe v. Holliday*, 62 Ind. 4; *Citizens, etc., Co. v. Ohio Valley Tie Co.* 138 Ky. 421, 128 S. W. 317; *Slack v. Stephens*, 19 Colo. App. 538, 76 Pac. 741. In the injunction suit the plaintiff did not claim anything by virtue of the order of the building inspector, though it was alleged that the defendant had been refused a license to repair, and it was found by the court to be so because of neighborhood influences. Perhaps she could not, but if it is a bar now it was then a valid ground of affirmative action, and cannot now be asserted as a bar. The issue was whether Pelkey had the right to continue his ice business and the judgment determined that he had.

It may be noted that the injunction goes farther than the order of the building inspector. It restrains Pelkey from using his premises for the storage of ice, except such as was there prior to the commencement of the action, and restrains him from carrying on his ice business on the premises. Evidence was offered that he could have carried on an ice business without the ice house. In any event the injunction was broader than the order.

3. Whether the order of the building inspector has a bearing on any phase of the controversy, as for instance upon the amount of damages, we do not consider at length. Nor do we say anything of the validity or construction of the ordinance. It is clear enough though that the order of the building inspector was not final and conclusive. Pelkey by the terms of the ordinance might have been prosecuted for noncompliance with the inspector's order. No one claims that he could be convicted merely because he did not comply with the order, unless his building was something in the nature of a nuisance. Were it otherwise the building inspector could require the residents of a respectable residence street to tear down their dwellings with the alternative of being adjudged guilty of an offense and in the same way could affect business districts. Municipal officers and boards in the exercise of the police power often command and enforce restraints upon the use of private property which do not amount to the taking of property without due process, although there is no hearing, and from the doing of which they cannot be enjoined. *Sings v. Joliet*, 237 Ill. 300, 86 N. E. 663, 22 L.R.A.(N.S.) 1128, 127 Am. St. 323; *Stone v. Heath*, 179 Mass. 385, 60 N. E. 975; *People v. Department of Health*, 189 N. Y. 187, 82 N. E. 187, 13 L.R.A.(N.S.) 894; *North American, etc., Co. v. Chicago*, 211 U. S. 306, 29 Sup. Ct. 101, 53 L. ed. 195, 15 Ann. Cas. 276. But an owner whose property has been interfered with or taken has at some time and in some form the right to have it judicially determined whether the interference and taking were rightful. *Hennessey v. City of St. Paul*, 37 Fed. 565; *Lowe v. Conroy*, 120 Wis. 151, 97 N. W. 942, 66 L.R.A. 907, 102 Am. St. 983, 1 Ann. Cas. 341; *People v. Board of Health*, 140 N. Y. 1, 35 N. E. 320, 23 L.R.A. 481, 37 Am. St. 522; *City of Orlando v. Pragg*, 31 Fla. 111, 12 South. 368, 19 L.R.A. 196, 34 Am. St. 17; *Sings v. Joliet*, 237 Ill. 300, 86 N. E. 663, 22 L.R.A.(N.S.) 1128, 127 Am. St. 323.

There is not much in the claim that the plaintiff is collaterally attacking the order of the inspector. The defendants are seeking to take advantage of it collaterally. The order may not be of further importance and we pass it without further remark.

4. The plaintiff sustained some damage. He had something like 150 tons of ice stored before the injunction and the injunction prevented the use of his premises except for such ice as was placed there prior to the

commencement of the action, which was in January. There was a little salvage but there was direct damage to the extent of perhaps \$100, and perhaps there was some loss by arranging for ice the storage of which was prevented by the injunction. It was but a trifle. Whether the plaintiff can recover for loss of the profits of his business for 1917 is doubtful. He had at the most a place to store ice, an ice route, and an equipment of horses and wagons. He discontinued his ice route the preceding August because of inability to supply ice. He then had little left of an established business. He did not harvest or manufacture ice but bought and stored it for distribution. His equipment he used in 1917 advantageously on city work. His evidence of loss of profits was slight and uncertain and at the best would justify the award of but a small or perhaps only a nominal sum.

Order reversed.

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ANNIE McCROSSIN, AS ADMINISTRATRIX OF THE ESTATE  
OF JOHN McCROSSIN, DECEASED, v. NOYES BROS. &  
CUTLER, INC.<sup>1</sup>

June 27, 1919.

No. 21,303.

**Poison — sale of proprietary compound.**

1. In the absence of some statutory obligation, a vendor of another's proprietary compound owes no duty to the purchaser or the public to ascertain whether it contains ingredients that may be harmful or dangerous, if the compound be used for purposes other than those for which it was designed.

**Death by wrongful act — violation of statute not charged.**

2. In this action for wrongful death against the vendor of such compound, the complaint does not charge a violation of section 5039, G. S. 1913, since there are no allegations that Roach Doom, the compound sold and the one causing the death, contained any of the drugs specified in the section or any "commonly recognized poison."

**Poison — duty of manufacturer and vendor to give information.**

3. A manufacturer of an article or compound imminently dangerous in kind owes to the public a positive and active duty to limit the danger, by labeling or otherwise conveying knowledge of the danger. And a

<sup>1</sup>Reported in 173 N. W. 566.

like duty rests upon a vendor who knows of the dangerous qualities of the article sold by him and knows that its label or name does not adequately convey knowledge to the purchaser or public of such danger.

**Complaint insufficient.**

4. The complaint is *held* defective in not alleging that the compound sold was imminently dangerous, and in alleging in the alternative that defendant knew, or in the exercise of due care ought to have known, of the dangerous qualities, and in failing to allege positively the misleading or defective character of the label.

Action in the district court for Ramsey county to recover \$7,660 for the wrongful death of plaintiff's intestate. Defendant's demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action was overruled, Olin B. Lewis, J., and the question presented by the demurrer certified as important and doubtful. From the order overruling the demurrer, defendant appealed. Reversed.

*B. H. Scriber*, for appellant.

*Leonard Ericksson*, for respondent.

HOLT, J.

In overruling the demurrer to the complaint the court below certified that the question involved was important and doubtful, thus affording defendant the opportunity, which it has used, of appealing.

The action is for wrongful death. Plaintiff alleges her appointment as administratrix of the estate of John McCrossin; that defendant is a wholesale dealer in drugs, proprietary medicines and goods, compounds, poisons and supplies; that defendant on December 16, 1916, sold and delivered to the State Board of Control for this state a certain compound known in the trade as "Roach Doom," which it knew was purchased to be used for the extermination of roaches in the state institutions including the State Hospital for the Insane at Fergus Falls; that defendant knew that the nurses and other employees in said institutions were ignorant of the ingredients of said compound and would rely wholly upon the knowledge to be gained from the descriptive label upon the package containing the compound; that there was nothing in the contents of the label which would indicate to the public or to anyone that there was anything dangerous or poisonous in "Roach Doom" or that it would produce sickness or death to anyone who might accidentally or otherwise

partake thereof; that said compound contained substances or chemicals of a poisonous and dangerous nature, and would cause sickness and probably death to such persons as might partake thereof and that "defendant at the time of the sale and delivery of said 'Roach Doom' did then and there know, or by reasonable care ought to have known, that the materials used in the manufacture of said 'Roach Doom' were dangerous and deleterious ingredients and substances, and that said 'Roach Doom' contained certain chemicals and chemical compounds, poisonous elements and substances \* \* \* and the said defendant did know that said 'Roach Doom,' if not properly used, would cause injury and sickness and probably death to such persons as might use the contents thereof."

It is further alleged that plaintiff's intestate, a railroad employee earning stated wages, had had a nervous breakdown shortly before his death and had been committed for treatment to the State Hospital for the Insane at Fergus Falls and was being cared for there; that while he was there so treated and cared for the employees in the institution distributed Roach Doom so purchased "in the way of roaches," and left the balance of the contents of the package on the kitchen range; that said employees did not know of the poisonous ingredients in the compound, but believed it harmless to human beings; that plaintiff's intestate did not know or appreciate the poisonous character of the substance in the package, but, in the belief that it was fit to eat, placed a considerable portion thereof in his coffee and drank it; that thereby he became sick and poisoned, dying on July 28, 1918, within four hours after its use

The above is believed to contain a summary of the allegations upon which alone there can be any hope of basing a cause of action. There are numerous allegations to the effect that it was defendant's duty as a vendor of compounds to have the same analyzed for deleterious or poisonous ingredients before selling the same, and when such compounds were found to contain substances dangerous to human life to notify the intended users thereof by label or otherwise, and that this duty was not performed by defendant. We consider these allegations and others like them immaterial. It is not alleged that defendant compounded Roach Doom; at most it was a vendor of another's proprietary product. We do not understand the law to be that a vendor of such articles, either at



wholesale or at retail, is required to analyze or ascertain at his peril whether the same contain any dangerous or poisonous ingredients and give warning accordingly. No authority so holds.

There are statutory provisions holding a seller chargeable with knowledge of the character of certain chemical compounds, drugs and medicines, and plaintiff makes some claim that section 5039, G. S. 1913, is applicable. But it is to be noted that this section provides that certain named poisonous drugs and "any other commonly recognized poison" must be labeled so as to indicate the poisonous character thereof. The complaint does not bring Roach Doom within this law, for there is no allegation that the deleterious substance therein was "any commonly recognized poison," or that it was one of the drugs therein specifically named.

Plaintiff must therefore fall back on the proposition that, unaided by any statutory provision in respect to the vending of this compound, there is a common law action for tort stated in the complaint. In 29 Cyc. 479, it is said that the manufacturer or vendor who deals with an article imminently dangerous in kind owes to the public a positive and active duty of employing care, skill and diligence to limit that danger, and this arises from a duty not to expose the public to danger. It is stated that this applies to dangerous chemicals, poisons and dangerous drugs, but that no liability attaches where proper care has been exercised, nor where the injury occurs through a use of the article other than that for which it was furnished. The last statement is too broad for application under all circumstances. The only case cited in its support is *Favo v. Remington Arms Co.* 67 App. Div. 414, 73 N. Y. Supp. 788, where it no doubt fits the facts. That involved a gun manufactured to withstand the strain when fired with the powder in use at the time the gun was placed on the market, but which burst when the powerful smokeless powder subsequently invented came in use.

Substances or compounds imminently dangerous, no matter for what use intended, may not be placed before the public without due care to warn against the inherent dangers. Of course, there are substances so generally known and recognized as dangerous that no warning need be given, except that furnished by vending them under their true name, such as gunpowder, carbolic acid and the like. But, as a general rule,

the manufacturer or compounder of articles for the market containing deadly ingredients or qualities owes a duty to those into whose hands the articles may come to suitably convey notice of the danger, so that proper precautions may be taken to prevent a wrongful use and consequent injury. This is generally done by naming or properly labeling the package in which the articles are marketed. In *Hasbrouck v. Armour & Co.* 139 Wis. 357, 121 N. W. 157, 23 L.R.A.(N.S.) 876, the law is stated thus: "A manufacturer or vendor putting out and selling articles inherently dangerous, such as explosives or poisons, without notice to others of their dangerous nature or qualities, or with a misleading notice or negligently in any other way, is liable for any injury to any third person which might have been reasonably foreseen by the manufacturer or dealer in the exercise of ordinary care." If this duty is imposed upon the manufacturer or compounder it would seem equally true that it also falls upon the vendor who knows the dangerous quality of the substance he sells, and who knows that neither the name, label nor appearance thereof indicates its dangerous character. The inquiry then, in respect to this complaint, is:

(1) Are the allegations sufficient as to the imminent danger lurking in Roach Doom? (2) Had defendant knowledge thereof? and (3) Did the label or name on the package not give adequate notice of the character of the substance?

Many articles of common use contain poisonous or deleterious ingredients, but either the quantity is so small, or its taste or smell so repulsive that no great harm is likely to result from its use for other purposes than that intended. There is no direct allegation in the complaint that Roach Doom was imminently dangerous. It is only inferentially to be gathered from the allegation that a "large portion" thereof resulted in the death of plaintiff's intestate.

But we think the most serious defect in the complaint arises from the allegations embraced within the quotation marks above to the effect that defendant knew, or in the exercise of reasonable care ought to have known that Roach Doom contained poisonous or deleterious ingredients. The allegations are in the alternative. If one be true, and is indispensable in stating a cause of action, and the other though true states no cause, they neutralize each other, and demurrer will lie. *Anderson v.*

Minneapolis, St. P. & S. S. M. Ry. Co. 103 Minn. 224, 114 N. W. 1123, 14 L.R.A.(N.S.) 866. We have above indicated that the law does not impose the duty upon a vendor of another's proprietary compounds to acquire knowledge of their ingredients or qualities. Hence he is not required to exercise due care in that direction, and no cause of action can be predicated upon the failure to exercise due care to obtain such knowledge. This allegation, being joined in the alternative with the one charging actual knowledge, makes the pleading so ambiguous and uncertain upon a vital matter as to be demurrable.

It is questionable whether the allegations that the label failed to reveal the dangerous qualities of the compound are sufficient. The strongest averment is "that there was nothing in the contents of the label describing the ingredients of said 'Roach Doom' which would indicate to the public \* \* \* that there was anything dangerous or poisonous about said 'Roach Doom' \* \* \* to anyone in the use thereof." From the pleading it is to be understood that the label contained the name Roach Doom. It would seem the name itself would be sufficiently suggestive of the danger to life from the preparation. What is destructive of lower animal life is also likely to affect man harmfully. It is not alleged that the label contained anything that would mislead in this respect. Of course, we cannot help out the complaint by accepting as true the statement in respondent's brief that the label conveyed the information that Roach Doom was harmless to human life and took two weeks to effect the doom of the roach.

Respondent and the court below relied on cases like *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Neiman v. Channellene Oil & Mfg. Co.* 112 Minn. 11, 127 N. W. 394, 140 Am. St. 458, where the substance sold was unfit or dangerous for the purpose for which it was sold, resulting in injury while so used. Such was also the case of *Gerkin v. Brown & Sehler Co.* 177 Mich. 45, 143 N. W. 48, 48 L.R.A.(N.S.) 224, and *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455.

Since it will be necessary to amend the complaint in order to state a cause of action, attention should also be called to the fact that there is no direct allegation that plaintiff's intestate left a widow or any next of kin. No point has been made on that score in this appeal, but we under-

stand such allegations to be essential in an action to recover for wrongful death. *Schwarz v. Judd*, 28 Minn. 371, 10 N. W. 208.

Order reversed.

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JAMES M. MILLETT v. C. A. PEARSON.<sup>1</sup>

June 27, 1919.

No. 21,311.

**Homestead — evidence.**

On March 16, 1916, O was the owner of and occupied the premises in question with his wife, as their homestead. On that day he shot and killed his wife, and was immediately arrested and lodged in jail where he remained until June, when he was convicted and sentenced to the state prison for life. *Held*, that said premises continued to be his homestead until he conveyed the same to plaintiff in May, 1916.

Action in the district court for Dakota county to restrain defendant from selling certain premises by virtue of a judgment and execution thereon. The answer set up the recovery by defendant on March 23, 1916, of the judgment described in the second paragraph of the opinion, the levy of execution, and alleged that on May 5, 1916, and for a long time prior thereto, the premises were not occupied by John Ostapchuk or any member of his family as a dwelling place; that prior to that date he had terminated his business at South St. Paul, disposed of his household goods and effects and removed from said premises with the intention of abandoning the same as a dwelling place for himself and family with the intention of not returning thereto; and that more than six consecutive months had elapsed since his removal. The case was tried before Converse, J., who made findings and as conclusions of law found that plaintiff was not entitled to recover; that his rights were inferior to the right of defendant and that the action should be dismissed. From an order denying his motion to amend the findings and conclusions or for a new trial, plaintiff appealed. Reversed.

*J. M. Millett*, pro se.

*F. I. Bright*, for respondent.

<sup>1</sup>Reported in 173 N. W. 411.

QUINN, J.

The plaintiff brings this action to restrain the defendant from proceeding with the sale of the premises in question under an execution on a judgment against plaintiff's grantor, John Ostapchuk. The trial court, after hearing the testimony, found for the defendant and denied the injunction. From an order denying his alternative motion for an order amending the findings or for a new trial, plaintiff appeals.

In its decision the trial court found in substance, that during the month of March, 1916, Ostapchuk was the owner in fee of the premises in question, and that on and prior to the sixteenth day of said month he occupied the same with his wife as their homestead; that on that day Ostapchuk shot and killed his wife; that he was immediately arrested and incarcerated in the county jail and there kept until June 2, 1916, when he was tried, convicted of murder and sentenced to imprisonment in the Minnesota State Prison for the rest of his natural life, and has never since, in any way, occupied or resided upon the premises in question; that on March 23, 1916, the defendant recovered a judgment for \$64.87 against Ostapchuk, a transcript of which was duly filed and docketed on March 28, 1916, in the office of the clerk of the district court of the county in which the premises were situated; that on May 5, 1916, Ostapchuk executed to the plaintiff a warranty deed of said property, which was duly recorded in the office of the register of deeds on June 3, 1916; that the defendant, claiming said judgment to be a lien upon the premises, caused an execution thereon to be issued and placed in the hands of the sheriff of the county; that the sheriff levied upon said premises under the execution and was proceeding to sell the same when the plaintiff brought this action to restrain him from so doing. Then follows paragraph 6 of the findings, which reads as follows:

"That prior to the execution of said deed, and prior to the recording of same, the said John Ostapchuk had wholly abandoned said property as his homestead, and said property had ceased to be his homestead, and all homestead rights therein had become divested."

It is the contention of the appellant that the trial court erred in denying his motion to strike out all of paragraph 6 of the findings of fact, for the reason that such finding is a mere conclusion of law; that it is not a finding of any issuable fact and is not supported by the evidence.

We do not think the conclusion arrived at and expressed in paragraph 6 of the trial court's findings is warranted either by the testimony or the specific facts found in the case. In paragraph 1 of its findings the court finds: "That during the month of March, 1916, one John Ostapchuk was the owner in fee simple of the following described real estate, to-wit: \* \* \* and that prior to the 16th day of said month the said premises were occupied by himself and wife as their homestead, and was in fact their homestead." And in its memorandum attached to its decision it is stated: "The controlling question here is, was the property in question the homestead of John Ostapchuk up to the time he conveyed it to the plaintiff in May, 1916, or had he previously abandoned it? It was his homestead at the time of his wife's death in March of that year." Were the premises the home of John Ostapchuk on the fifth day of May, 1916, at the time he conveyed them to the plaintiff? If they were, the defendant's judgment did not become a lien thereon and the plaintiff obtained title under the deed. The premises were his homestead on March 16. On that day he was arrested and detained in the county jail until his conviction in June, when he was sentenced and taken to the state prison where he has since been confined.

As a general rule of law persons under legal disability or restraint or persons in want of freedom are incapable of losing or gaining a residence by acts performed by them under the control of others. There must be an exercise of volition by persons free from restraint and capable of acting for themselves in order to acquire or lose a residence. A person imprisoned under operation of law does not thereby change his residence. *Town of Freeport v. Board of Supervisors*, 41 Ill. 495; *Clark v. Robinson*, 88 Ill. 498; *Barton v. Barton*, 74 Ga. 761; *Grant v. Dalliber*, 11 Conn. 233.

There was no proof of any act on the part of Ostapchuk, subsequent to the death of his wife, from which a presumption can be drawn that he intended an abandonment of his homestead. His absence therefrom while under detention in the county jail raises no such presumption. To constitute an abandonment there must be an actual removal from the premises. An intention to remove is insufficient. *Robertson v. Sullivan*, 31 Minn. 197, 17 N. W. 336. The premises in question was the homestead of Ostapchuk at the time of his arrest, and remained his legal

abode until he conveyed the same to the plaintiff, notwithstanding his detention in jail. In *Grant v. Dalliber*, supra, A was sentenced to the state prison for four years. During his detention in prison B attached his real estate, leaving copies at his dwelling house as his usual place of abode. B obtained judgment against A, and caused the real property attached to be sold upon execution. In an action of ejectment afterwards brought by A against B for the premises, it was held that the usual place of abode of A, during his imprisonment, was at such dwelling house, such usual place of abode not being changed or abandoned by a constrained removal.

In the present case it is conclusively established that Ostapchuk was occupying the premises with his wife as their homestead at the time of her death. Nothing having occurred thereafter to indicate a purpose on his part to abandon the homestead, it is held, that the premises continued to be his homestead until the conveyance thereof to the plaintiff, and that defendant's judgment did not become a lien thereon.

Reversed.

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BECK ELECTRIC CONSTRUCTION COMPANY v. NATIONAL  
CONTRACTING COMPANY AND OTHERS.<sup>1</sup>

June 27, 1919.

No. 21,313.

**Accord and satisfaction — payment by check.**

1. Receiving and cashing a check which shows on its face that it is to be accepted as full payment of a disputed claim or returned, operates as an accord and satisfaction of the claim.

**Same — erasure of words "in full."**

2. The effect of cashing the check is not changed by erasing the words, "in full," without the knowledge or consent of the other party, as it must be accepted as tendered or rejected.

Action in the district court for Douglas county to foreclose a mechanic's lien. The case was tried before Roeser, J., who made findings and

<sup>1</sup>Reported in 173 N. W. 413.

as conclusions of law found that plaintiff was entitled to recover against National Contracting Company and Louis Ginther; that defendant Hart was entitled to recover against defendant Ginther, and ordered a sale of the real estate to satisfy the judgments. From the judgment entered against Louis Ginther and in favor of William E. Hart, Louis Ginther appealed. Reversed.

*Constant Larson*, for appellant.

*George L. Treat*, for respondent.

TAYLOR, C.

This action was brought to enforce a mechanic's lien, but has been settled as to all claimants except defendant Hart, and the owner asserts that Hart's claim has also been fully satisfied and discharged. The court found a balance of \$100 due Hart and rendered judgment for that amount with interest and costs. The owner appealed.

We find it necessary to consider only one question. The National Contracting Company had the contract to remodel and rebuild a hotel at Alexandria, and sublet to Hart the painting covered by its contract for the sum of \$1,100. The owner also employed Hart to do extra work in the old part of the building, for which the owner was to pay, but the account for which was to be kept by the contractor as a part of its account with Hart. Hart received the full \$1,100 from the contractor for work under the original contract and something over \$500 on account of the extra work. He claimed something like \$800 still due for the extra work. The owner claimed that the charges for the extra work were exorbitant and refused to pay them. He also made a claim against the contractor for the expense of reperforming certain defective work done by Hart under his original contract. The contractor seems to have conceded that this was a valid claim, at least to the extent of \$100, and insisted that Hart should make good his default. The owner, the contractor and Hart met for the purpose of settling Hart's claim for the unpaid balance for the extra work. Hart reduced this claim to the sum of \$700. The owner insisted that the balance due did not exceed \$500, but offered to compromise at \$600. The item for defective work seems not to have been considered at this meeting, as the owner asserted his claim for this against the contractor and not against Hart. The



parties separated without effecting a settlement, and the owner seems to have authorized the contractor to act for him thereafter. Some correspondence took place between the contractor and Hart, in which Hart offered to split the difference between the amount claimed by him and the amount offered by the owner, but refused to concede anything more. Thereafter the contractor sent Hart a check, stating in the accompanying letter that he had been given credit for \$650 on account of the extra work; that \$100 had been deducted for the defective work; that several other items (not in dispute) had also been deducted, and that the check balanced his account in full according to the books. This check reads:

"Pay to William Hart, or order, in payment of contract in full for painting Alexandria hotel \$484.37 four hundred eighty four dollars thirty seven cents. If not correct, return, without alteration, stating differences."

Hart received this check, drew a pen line through the words, "in full," and indorsed it and cashed it. The first information that he gave to either the owner or the contractor that he made any further claim was when he interposed his answer in this action.

"When a check is sent upon the condition that it be accepted in full payment of a disputed claim, there is, as a general rule, but one of two courses open to the creditor, either to decline the offer and return the check or to accept it with the condition attached. The moment the creditor endorses and collects the check, knowing it was offered only upon condition, he thereby agrees to the condition and is estopped from denying such agreement. It is then that the minds of the parties meet and the contract of accord and satisfaction becomes complete." 1 Ruling Case Law, 196, § 32.

The statement in the text is amply supported by the authorities cited and also by the authorities cited in 1 Corpus Juris, 558, 562. In the present case there was a bona fide dispute as to the amount due. The check showed on its face that it was to be accepted as full payment of the claim or be returned. When Hart collected it, it operated as an accord and satisfaction, and his claim was extinguished. Erasing the words, "in full," without the knowledge or consent of the other party, did not change the effect of the instrument. He was required to ac-

cept it as tendered or reject it. By cashing it he accepted it as tendered, and the accord and satisfaction was complete. 1 C. J. 564.

Judgment reversed.

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PAUL C. KEYES, AS RECEIVER OF THE FIRST NATIONAL  
BANK OF CLARKFIELD, MINNESOTA, v. THEODORE  
MYHRE AND OTHERS.<sup>1</sup>

June 27, 1919.

No. 21,328.

**Bank — transfer of stock — liability of seller for stock assessment.**

*Held*, following the rule stated and applied in *Whitney v. Butler*, 118 U. S. 655, that defendants neglected no duty resting upon them to cause and effect a transfer of stock in the national bank in question, which they had sold in good faith, and that they are not liable for a stock assessment made in insolvency proceedings three years after such sale.

Action in the district court for Yellow Medicine county to recover \$1,000, the amount of an assessment upon the bank stock of M. T. Myhre. The answer alleged that prior to March 1, 1914, defendants sold and assigned the stock in question to George J. Piersol. The case was tried before Daly, J., who made findings and as conclusions of law found that by the sale and transfer of the stock Piersol became the owner of the same, and defendants were not liable for the assessment. Plaintiff's motion to amend the findings and conclusions was denied. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

*J. N. Johnson*, for appellant.

*C. A. Fosnes*, for respondents.

BROWN, C. J.

The facts in this case as disclosed by the findings of the trial court are substantially as follows:

The First National Bank of Clarkfield, this state, was duly organ-

<sup>1</sup>Reported in 173 N. W. 422.

ized as a national bank under the Federal statutes, its charter having been issued on October 1, 1902. From that date until declared insolvent in September, 1918, it carried on and conducted a general banking business at the location stated. When so adjudged insolvent plaintiff was duly commissioned as receiver to wind up its affairs. The assets of the bank were insufficient to pay and discharge the debts and liabilities in full and an assessment of 100 per cent was duly levied upon the stockholders.

At the time of or soon after the organization of the bank, one M. T. Myhre became a stockholder therein, and two certificates of stock of \$500 each were issued and delivered to him. He continued to own and hold the same until his death, which occurred on the fourteenth day of April, 1913. By his death the title and ownership of the stock, with other property of which he died seized and possessed, passed to his widow and children. The widow died on December 27, 1913, leaving as sole heirs to the Myhre estate, including the bank stock, defendants in this action, who are the sons and daughters of the decedents, and who received from the estate more than the amount of the stock assessment.

The stock was sold by defendants on February 27, 1914, to George J. Piersol, who from the organization of the bank to the time of the adjudication of insolvency was the cashier and at all times engaged in the active charge of its affairs. The executor of the estate of Mrs. Myhre joined in the sale. The sale was made in good faith, in the usual course of such transactions, and the bank was then solvent and a going concern. The consideration was \$1,200, which Piersol paid at the time. The certificates of stock were properly indorsed by the defendants and the executor and delivered to the cashier, together with a blank power of attorney printed on the back thereof and above the signatures of defendants, authorizing a transfer on the books of the bank, and they at all times since remained at the bank and in its vault with other papers belonging to the bank and to the cashier.

Although the sale and delivery of the stock to the cashier took place some three or more years prior to the insolvency of the bank, no transfer thereof was ever entered on its books, and at the time of the insolvency Myhre still appeared on such books as the owner of the same. Yet

defendants were at no time thereafter treated by any officer of the bank, so far as the record discloses, as having any interest therein.

This action was brought by the receiver to recover the amount of the stock assessment, on the ground that, since there was no transfer of the stock on the books of the bank, defendants as heirs of the estate are liable as the real owners. Defendants had judgment and plaintiff appealed.

Defendants are presumptively liable, for there was no transfer of the stock upon the books of the bank. *Matteson v. Dent*, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. ed. 571. But they may interpose the sale of the stock in defense, and a showing of a good faith transaction, even though not registered on the bank books, will relieve them from liability, unless the conclusion necessarily follows from the facts stated that they neglected some duty arising from the situation to cause and bring about a proper entry of the changed ownership. If there was no neglect on their part in that respect they are not liable, for they are not the real owners of the stock, and were not such owners at the time the bank became insolvent. *Whitney v. Butler*, 118 U. S. 655, 7 Sup. Ct. 47, 30 L. ed. 266; *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. ed. 864; *Snyder v. Foster*, 73 Fed. 136, 19 C. C. A. 406. We think and so hold that the facts bring the case within the rule applied in *Whitney v. Butler*, just cited, and therefore that the trial court properly gave judgment for defendants.

It appeared in that case that the stock there involved was sold by a broker who, as agent of the selling stockholder, presented the stock certificates properly indorsed with a power of attorney authorizing and providing for a transfer on the books of the bank to the president thereof at the banking house, where they at all times thereafter remained. No objection was made to the transfer nor to the form of the authority to make the same, or intimation given out by the president that an entry thereof would not be made. No transfer was in fact made, however, and the selling stockholder remained the owner of record at the time the bank was later adjudged insolvent. The court held that the selling stockholder had done all that should reasonably be required of him in such case and he was held not liable.

In the case at bar the sale of the stock was in good faith and for val-

ue paid at the time. The certificates were delivered to the purchaser, who happened to be the cashier of the bank, properly indorsed with a power of attorney authorizing a transfer on the bank books. The certificates so indorsed thereafter remained at the bank in a safety deposit box in which were kept papers and documents belonging to the bank and also papers and documents belonging to the cashier. The situation so continued for over three years with no suggestion by any officer of the bank that a transfer was withheld for any reason, nor were defendants advised that a proper transfer had not been made, nor in any way thereafter treated as stockholders or as having any interest in the bank; no dividends were paid them. Although defendants made no specific demand that the cashier enter the transfer on the books, that fact should not be held to expose them to liability. It was the duty of the cashier to make the transfer and the situation presented no reasons suggestive to defendants that he would either neglect or refuse to perform the same. A formal request would have added nothing in protection of the rights of others, and the burden of the default of the cashier should not be cast upon them, for they are entirely innocent of any intentional omission of anything necessary to completely divest them of all evidence of title or ownership of the stock.

The case cannot well be distinguished in point of substance from the Whitney case. *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. ed. 864, is distinguishable in its facts. See *Snyder v. Foster*, 73 Fed. 136, 19 C. C. A. 406.

Judgment affirmed.

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GEORGE KIVAK v. GREAT NORTHERN RAILWAY  
COMPANY.<sup>1</sup>

June 27, 1919.

No. 21,853.

Master and servant — place of work chosen by servant.

1. The rule that a servant who voluntarily selects a place for the performance of his work other than that provided by the master, and

<sup>1</sup>Reported in 178 N. W. 421.

is injured from defects in the place so selected, is not entitled to recover for such injuries, followed and applied.

**Same — negligence of fellow servants — evidence.**

2. Evidence held insufficient to justify a verdict of negligence in the failure of fellow servants to go to the rescue of plaintiff when in a position of peril.

**Evidence.**

3. In determining what fact the testimony of a particular witness establishes or tends to establish, his whole evidence as brought out on direct and cross-examination should be considered.

Action in the district court for Ramsey county to recover \$16,000 for injuries received while employed in defendant's repair shops. The answer alleged that plaintiff had full knowledge and information of all the risks and dangers connected with the work of unloading and rolling car wheel tires and assumed the risks and dangers, and specifically denied that plaintiff was engaged in work connected with the movement of interstate commerce within the provisions of the Federal Employer's Liability Act. The case was tried before Dickson, J., who at the close of the testimony granted defendant's motion for a directed verdict. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

*McNamara & Waters*, for appellant.

*M. L. Countryman* and *A. L. Janes*, for respondent.

**BROWN, C. J.**

Action for personal injuries, in which at the conclusion of the trial a verdict was directed for defendant and plaintiff appealed from an order denying a new trial.

Plaintiff was in the employ of defendant in its shop yards in the city of St. Paul, and at the time of his injury was assisting other employees in unloading and rolling to a place of storage large heavy iron tires, such as are used on engine and other car wheels. The tires were of different sizes and weight ranging from 36 to 42 inches in diameter and from 400 to 700 pounds in weight. They were being removed from the car in which they were brought to the yards, and thence under the guidance of plaintiff rolled to the place of storage. One of the tires so

being rolled by plaintiff got beyond his control and toppled over, falling upon and injuring his foot and ankle. The injury so received is that for which he seeks to recover in this action.

The facts are fully stated in the complaint and of the several acts of negligence therein charged only two were urged upon the attention of this court, namely: (1) That defendant failed to provide plaintiff with a safe place in which to do his work; and (2) that there was negligence in the failure of his fellow servants to come to his rescue and assistance when they were advised that he was in a position of peril by reason of his inability to handle the particular tire.

The only question presented is whether there was evidence to take either of those issues to the jury. We are of opinion that it should be answered in the negative.

There is no substantial dispute as to the material facts. Plaintiff had been in the employ of defendant in and about the yards in which the work in question was under way for about five years. Although for a time immediately previous to the accident he had been engaged exclusively in car repair work, the greater part of his term of service covered and included work of the kind here involved, and he was fully informed of the character thereof and of all the difficulties and dangers incident to its performance. The unloading and storing took place in the shop yards, and the storage grounds were in the immediate locality where the tires were being taken from the car in which they were shipped. A solid and substantial roadway had been constructed by the company along or near to the storage grounds, which prior to the day in question was used in rolling the tires to storage quarters. It provided a suitable and safe way over which to perform that work and plaintiff in his previous work had so used it. It was not used at the time in question. When the tires came from the car on this occasion he attempted to guide them to destination over a route selected by himself, near the roadway, but which, if plaintiff's present claim be true, was not a safe or suitable place for the work; in fact his whole case rests upon the contention that the route so selected was covered with concealed holes in the ground, one of which caused the accident resulting in his injury.

The trial court held that there was no evidence that defendant pro-

vided the particular place for this work, that plaintiff selected it of his own motion, thus abandoning the way prepared by defendant and therefore used for the purpose, therefore that no failure on the part of defendant to provide plaintiff with a safe place, negligent or otherwise, was shown. The evidence of plaintiff taken as a whole fully supports that conclusion. The contention that the prepared way could not be used at the time is not borne out by the evidence. Had the case been sent to the jury on that theory and a verdict returned to that effect, it would find no support in the evidence and could not stand. The case therefore comes within the rule that where a master has furnished a reasonably safe place in which to perform the work of the servant his full duty is performed, and he is not liable for injuries occurring to a servant at a place other than that so prepared, which the servant voluntarily selects for the purpose and which turns out as unsuitable, defective and unsafe. The law is well settled upon that question. 2 Dunnell, Minn. Dig. § 5877.

The evidence requires no further discussion, though it may be remarked that, in determining what fact the testimony of a particular witness establishes or tends to establish, his whole evidence as brought out both on the direct and cross-examination must be considered. So considering the evidence given by plaintiff the facts as stated clearly appear and lead only to the conclusion stated.

2. The second question, namely, whether plaintiff's fellow servants were negligent in failing to come to his assistance does not require extended discussion. It is without substantial merit. The evidence is wholly insufficient to justify the conclusion that the fellow servants of plaintiff were aware that he was in danger of injury, or that they ought to have known thereof. The toppling over of one of the tires when being rolled to its place was not an uncommon occurrence. And although the other workmen knew that the particular tire had fallen over, it would be a severe strain to hold that they knew or appreciated any danger of injury to plaintiff therefrom; at any rate they were some distance away and in no position to render assistance in time to avoid the injury. They were not therefore neglectful of any duty the law imposed upon defendant through them.

Order affirmed.



NORTHERN TIMBER PRODUCTS COMPANY v. STONE-  
ORDEAN-WELLS COMPANY AND ANOTHER.<sup>1</sup>

July 3, 1919.

No. 21,239.

**Replevin against sheriff.**

1. Plaintiff alleges that defendant sheriff, holding a writ of attachment in a suit by defendant company against others, at the direction of defendant company attached plaintiff's property and took it into his possession, and withholds possession from plaintiff, that defendants knew or should have known that plaintiff was the owner, and that plaintiff's business and credit were injured. Judgment for return of the property is demanded.

**Replevin — complaint good — return of property.**

2. The complaint states a good cause of action in replevin. It is not necessary that the plaintiff ask for the immediate delivery of the property.

**Same — parties defendant.**

3. Replevin must be directed against a party in possession, but others interested, though not in possession, may be joined as defendants. In replevin against an attaching officer in possession, an attaching creditor who directed the attachment to be made may be joined as a defendant.

**Damages too remote — joinder of causes of action.**

4. Damages to plaintiff's business and credit are too remote and speculative for recovery. The complaint alleges no facts for recovery of punitive damages. It does allege as damages the loss of the use of the property by reason of its detention. In substance the complaint states a cause of action against both defendants for replevin of property and for damages for its detention. This is but a single cause of action. That some of the allegations are labeled "second cause of action" is not important. The complaint is not subject to the objection that causes of action are improperly united and it is not demurrable.

Action in the district court for Roseau county to recover \$9,000. The

<sup>1</sup>Reported in 173 N. W. 439.

allegations of the complaint are found at the beginning of the opinion. Defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, Watts, J., on the ground that two causes of action were improperly united. From the order sustaining defendants' demurrer, plaintiff appealed. Reversed.

*M. J. Hegland and Charles T. Wetherby*, for appellant.

*Courtney & Courtney*, for respondents.

HALLAM, J.

1. Plaintiff's complaint alleges that plaintiff owned and had in its possession certain timber; that defendant Stone-Ordean-Wells Company commenced an action against Eklund & Wetherby, a partnership, and obtained a writ of attachment directing the sheriff to seize the unexempt property of said parties; that the writ was delivered to defendant Rice as sheriff; that Stone-Ordean-Wells Company instructed Rice to attach the timber of plaintiff, and in pursuance of such instructions Rice did attach said timber, and took it into possession, and that the same is now withheld from plaintiff and that such detention is wrongful. Judgment for return of the property is demanded.

As a so-called second cause of action it is alleged that the property was taken from the possession of one who was the agent of the plaintiff, a fact "which was well known to defendants, or they could and should have known the same;" that defendant Stone-Ordean-Wells Company had a large claim against Eklund & Wetherby and conceived the idea that it would compel plaintiff to pay the debt and had the sheriff attach the property of plaintiff in order to compel plaintiff to pay said debt; that by reason of the attachment plaintiff was unable to perform contracts which it had made for the sale of said timber; that the attachment caused it to keep idle an employee who was under pay; that it injured plaintiff's credit, and that plaintiff is also entitled to "interest on the value of the timber during the period of attachment."

Defendant demurred on the ground that the complaint failed to state a cause of action and that several causes of action were improperly united. The trial court sustained the demurrer to the complaint and in a

memorandum stated that it was sustained on the ground that two causes of action are improperly united. Plaintiff appeals.

2. The complaint states a good cause of action in replevin. All the necessary allegations are present. Plaintiff does not ask immediate delivery of the property, but this is not necessary. *Benjamin v. Smith*, 43 Minn. 146, 44 N. W. 1083; *White v. Flamme*, 64 Minn. 5, 65 N. W. 959.

3. It states a cause of action in replevin against both defendants. Replevin could not have been maintained against defendant Stone-Ordean-Wells Company alone, for that defendant was not in possession, and replevin must be directed against a party in possession. *Tozier v. Merriam*, 12 Minn. 46 (87). But it is equally clear that another party interested with the party in possession may be joined with him as a defendant. In replevin against an attaching officer who has possession under the writ of attachment, the attaching creditor who directed the attachment to be made may be joined as a defendant, to the end that the whole controversy may be determined in one action. *Cobbey, Replevin*, § 441.

The so-called second cause of action relates entirely to allegations of damages. Most of the allegations are insufficient.

The alleged damage to plaintiff's business and credit is too remote for recovery. *O'Neill v. Johnson*, 53 Minn. 439, 55 N. W. 601, 39 Am. St. 615; *Casper v. Klippen*, 61 Minn. 353, 63 N. W. 737, 52 Am. St. 604; *Sutherland, Damages*, §§ 512, 513.

The complaint falls far short of alleging the facts essential to the recovery of punitive damages. *Vine v. Casmey*, 86 Minn. 74, 90 N. W. 158; *Anderson v. International Harvester Co.* 104 Minn. 49, 116 N. W. 101, 16 L.R.A.(N.S.) 440.

Plaintiff, however, alleges a detention of the property by attachment, and claims as damages "interest on the value of the timber during the period of attachment." This, crudely stated, is in substance an allegation and claim of damages for the value of the use of the property by reason of its detention, and it is an assertion of a claim against both defendants.

Stripped of its much redundant matter the complaint states a cause of action in replevin for the recovery of personal property and for dam-

ages for its detention, nothing more. These two demands may be joined. G. S. 1913, § 7780. They constitute but a single cause of action and they affect both parties. The fact that the pleader labeled a portion of his complaint "second cause of action" is not important. The question is has he alleged two causes of action which are inconsistent? He has not. He has alleged but one. The complaint is not demurrable. Application may be made to the trial court for leave to answer.

Order reversed.

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STATE v. N. S. RANDALL.<sup>1</sup>

July 3, 1919.

No. 21,284.

**Army and navy — violation of 1917 act — case followed.**

1. The defendant was convicted of violating chapter 463, Laws 1917, in a public address delivered on August 18, 1918, at Kenyon, Minnesota. The language employed is not essentially different from that spoken by Joseph Gilbert on the same occasion, resulting in his conviction, affirmed by this court. *State v. Gilbert*, 141 Minn. 263, 169 N. W. 790. Nearly all the errors assigned are identical with those assigned in the *Gilbert* case, and are ruled by the decision therein.

**Limiting number of witnesses prejudicial error.**

2. The trial court should not attempt to limit the number of witnesses of a party upon the main controverted issue or controlling fact of a case, unless it becomes apparent that there is a purpose to trifle with the administration of justice. The main issue in this case was what defendant said on the evening in question, and it was prejudicial error to limit the number of his witnesses to 12 of the 27 he had produced to testify on that subject.

**Repetition of defendant's speech.**

3. Defendant was entitled to repeat, if he could, all that he said on that occasion.

Defendant was indicted by the grand jury of Goodhue county charged with the crime of discouraging enlistment in the military and naval forces of the United States and advocating that citizens should not aid

<sup>1</sup>Reported in 178 N. W. 425.

and assist the United States in carrying on war with its public enemies. Defendant's demurrer to the indictment upon the grounds that more than one offense was charged, and that the facts stated did not constitute a public offense, was overruled. The case was tried before Converse, J., who at the close of the testimony denied defendant's motion to direct a verdict for the defendant and his motion to dismiss the action and to order a mistrial, and a jury which found defendant guilty as charged in the indictment. From an order denying his motion for a new trial, defendant appealed. Reversed.

*George Nordlin, Frederic A. Pike, Arthur Le Sueur and Thomas V. Sullivan*, for appellant.

*Clifford L. Hilton*, Attorney General, *James E. Markham*, Assistant Attorney General, and *Thomas Mohn*, for respondent.

HOLT, J.

Defendant, convicted of an offense under chapter 463, p. 764, Laws 1917, appeals from an order denying his motion for a new trial.

The indictment charged that on August 18, 1917, in the village of Kenyon, Goodhue county, Minnesota, in a public place where more than five persons were present, naming seven, defendant unlawfully and wilfully taught and advocated by oral speech that men should not enlist in the military and naval forces of the United States and that citizens should not assist in prosecuting the war with Germany by then and there stating and expressing to the persons named in substance and effect as follows, to-wit: "The rot that is being pulled off nowadays by our government with reference to this war is something so disgraceful that you have no idea of it. If the money of the rich were thrown into the war-chest, this war would end immediately. We must save food for the allies, they say; we must save food for them whether we get anything for ourselves. This is what makes high prices. The President of the United States has too much power in this country and he uses it to suit himself."

The sentences set out were uttered in the course of a public address, delivered by defendant to an audience of about 200 persons in the village of Kenyon, on the evening of the day mentioned. The meeting was held for the purpose of promoting the Nonpartisan League and gaining

it adherents. Defendant was an organizer and lecturer of the league. It was an open air meeting, the speakers occupying a portable band stand some ten feet from the sidewalk on the main street of the village. Mr. Gilbert and Mr. Martin, two other organizers or lecturers of the league, also spoke. Defendant spoke twice, the first time occupying about half an hour, and the last only a few minutes. Mr. Gilbert was also indicted, tried and convicted of violating chapter 463, on account of his address on that occasion. The conviction was sustained on appeal. *State v. Gilbert*, 141 Minn. 263, 169 N. W. 790.

The language which the indictment charges defendant with uttering is of a nature so similar to that set forth in the *Gilbert* indictment that it must be held to constitute an offense under the rule of that decision. The circumstances under which the language was used would as naturally lead to an inference of guilt in the one case as in the other. The main purpose of the speaker was no doubt to advance the cause of their own political organization and to advocate its principles. In aid of that purpose it might be as proper as it is usual to decry rival political parties, including the one in power, and to criticize the methods employed by those in office from the lowest to the highest. But we think it was for the jury to say whether in so doing they, by making use of the language set out, in connection with their other utterances on that occasion, went too far and taught what chapter 463 forbids.

Following the decisions of *State v. Holm*, 139 Minn. 267, 166 N. W. 181, L.R.A. 1918C, 304; *State v. Townley*, 140 Minn. 413, 168 N. W. 591; and *State v. Kaercher*, 141 Minn. 186, 169 N. W. 699, the opinion in the *Gilbert* case construed the chapter in question and, as so construed, sustained it against the attack that thereby the right of free speech, guaranteed by the Federal Constitution, was unduly curtailed. And section 3 thereof was upheld against the claim that it was not covered by the title of the act. It was also there decided that intent was not an ingredient of the offense created by chapter 463; that it was not error to receive evidence of remarks made by bystanders, nor to permit a witness to state the manner in which the accused made a statement (here testified to as given in a sneering manner, in the *Gilbert* case as given in earnest), and that the objection was properly sustained to questions, asked the state's witness in cross-examination, whether they had

taken any steps to prosecute defendant for his alleged seditious talk. These several propositions were raised in the Gilbert case by the same counsel who appeared for this defendant and were as forcible and ably presented by him then as now, but were resolved against him. We still adhere to the views expressed in the Gilbert case; and that decision must therefore rule the instant case, unless prejudicial error be found in the assignments of error now to be considered.

After the state rested and defendant's counsel had made his opening statement to the jury, wherein he indicated that 27 witnesses would testify that defendant did not say what he was charged with saying, the court announced that defendant would be limited to the testimony of 12 witnesses, including himself, as to what was said at that meeting. Counsel excepted, and announced that he had 27 witnesses present to testify, partly to the same facts and partly to an entirely different set of facts. Defendant took the stand, and called 11 other witnesses.

The authorities seem to be in accord on the proposition that the trial court may, in the exercise of sound judicial discretion, limit the number of witnesses as to any collateral fact or as to a given point in criminal as well as in civil cases. *State v. Beabout*, 100 Iowa, 155, 69 N. W. 429; *People v. Casselman*, 10 Cal. App. 234, 101 Pac. 693 (character witnesses); *Commonwealth v. Thomas*, 101 S. W. 326, 31 Ky. Law Rep. 899 (character witnesses); *State v. Bowerman*, 140 Mo. App. 410, 124 S. W. 41 (on impeachment of witnesses); *State v. Lamb*, 141 Mo. 298, 42 S. W. 827 (upon alibi).

In *Sheppard v. State*, 120 Ark. 160, 179 S. W. 168, the court said it was within sound judicial discretion to limit the number of witnesses as to a particular fact, and to decide at what point to stop the introduction of cumulative evidence. We find no case holding squarely that on the main issue the court may limit the number of a party's witnesses, unless it be in *Butler v. State*, 97 Ind. 378—a murder-charge—where it is said: "If the court had no discretion in such cases, then the case might be indefinitely delayed, and an unlimited number of witnesses called. But for this rule courts would be subject to the caprice of counsel, and public good would seriously suffer. We agree that this discretion should be so exercised as not to impair the rights of a defendant, nevertheless it does exist. But as the power is a discretionary one, an appellate court

can only interfere where it has been abused. If we can say from the record that the discretion has been abused, then we should review the ruling and reverse the judgment. This we cannot say, for the number of witnesses was limited to 45, and this, in itself, was not an unreasonable limitation." It may, however, be said that it does not clearly appear from the case as reported whether this restriction of the number of witnesses applied to those who could testify regarding the main issue.

In *Mergentheim v. State*, 107 Ind. 567, 8 N. E. 568, a prosecution for maintaining a canal so as to constitute a nuisance, the court following *Butler v. State*, supra, held it proper exercise of judicial discretion to limit the number of witnesses as to the odor and condition of the canal. It was fixed at seven.

The syllabus in *Samuels v. United States*, 232 Fed. 536, 146 C. C. A. 494, Ann. Cas. 1917A, 711, states: "It is within the discretion of the trial court to limit the number of witnesses a defendant charged with criminal offense may introduce on a single point in issue, and unless it appears clearly that there has been an abuse of discretion, which was prejudicial to defendant, an appellate court will not consider it cause for reversal." That was a prosecution for using the mails to defraud, the particular fraud consisting in advertising a worthless remedy as a cure-all, thereby obtaining money by misrepresentations. After the defendant had produced 35 witnesses who testified that they had been cured of different ailments by the use of his preparation, the court announced that only six more would be permitted to testify along that line. The court said that at best the evidence was merely cumulative, and it was discretionary whether more than 41 should be allowed to testify.

In *re Winslow*, 146 Iowa, 67, 124 N. W. 895, Ann. Cas. 1912B, 663, might also be cited as supporting the proposition that on the main issue the number of witnesses to be heard is discretionary with the trial court.

These four cases are the only authorities which might tend to sustain the rule which the learned trial court conceived to be applicable, namely, that it rested within his discretion to limit the number of witnesses. But it is to be noted that had the limitation of the number of witnesses in the instant case been near as generous as in the *Butler* or *Samuel* cases defendant would have had no occasion to complain.

However, the weight of authority is to the effect that in neither a



criminal nor in a civil case is it within the province of the court to limit the number of witnesses which a party may offer to prove or disprove the main issue or a controlling fact.

In *People v. Arnold*, 248 Ill. 169, 93 N. E. 786, a rape case, the court limited the character witnesses to 25, and it was said: "The court fixed that limit for each side, and while a court has no power to limit the number of witnesses to be heard as to a controlling fact, or facts or circumstances bearing thereon, it is not error to fix a reasonable limit concerning collateral matters such as this was."

To the same effect is *Green v. Phoenix Mut. Life Ins. Co.* 134 Ill. 310, 25 N. E. 583, 10 L.R.A. 576, where the court speaking of this power says: "Familiar illustration of cases in which the discretion could not be exercised where the inquiry is single, as in cases of right of way, the grant of prescriptive right, the proof of custom, or the identity of persons or property, which are disputed, will readily occur to anyone." The trial court restricted the defendant in a slander case to ten witnesses to prove plaintiff's reputation. This was held error in *Ward v. Dick*, 45 Conn. 235, 29 Am. Rep. 667, the opinion saying: "The subject matter of the inquiry was the value of a reputation. To the law this is a tangible thing; it is property in the highest sense; and we are not aware that in actions for injuries to property courts have assumed the right, either to prevent the plaintiff from establishing the value thereof at the highest possible point to which he could carry it by the power of testimony, or the defendant from diminishing it by the same means; and actions for injuries to character are not exceptions."

In *St. Louis, M. & S. R. Co. v. Aubuchon*, 199 Mo. 352, 97 S. W. 867, 9 L.R.A.(N.S.) 426, 116 Am. St. 499, 8 Ann. Cas. 822, strong reasons for not restricting the number of witnesses on the main issue are stated in the vigorous and characteristic language of Justice Lamm.

In *Barhyte v. Summers*, 68 Mich. 341, 36 N. W. 93, a new trial was granted because the court limited the number of witnesses upon a vital issue—the soundness of a horse claimed sold under misrepresentations. This case is approved in the later one of *Sulkowski v. Zynda*, 160 Mich. 7, 124 N. W. 536, 136 Am. St. 414.

In a case involving the quality of paint purchased, plaintiff desired to take the deposition of 250 witnesses; defendant petitioned to reduce the

number, but the court denied the petition. *Carrara Paint Agency Co. v. Carrara Paint Co.* 137 Fed. 319. See also *Jones, Evidence*, §§ 814 and 900, and cases collected in 8 *Am. & Eng. Ann. Cas.* 828.

We approve of the rule that, upon the vital controverted issue in a case, the trial court should refrain from any attempt to limit the number of the witnesses that a party may offer, unless a purpose to trifle with the administration of justice becomes apparent.

There can be no doubt but that what was said by defendant during this meeting was the main and vital issue in the case. That depended upon the uncertainty and the limitations of the memories of his auditors. The speeches of defendant were made seven months before the indictment and eight before the trial. Probably none of the witnesses anticipated until the return of the indictment ever to be called upon to recount what was said by anyone at the meeting. Necessarily their recollections had become dimmed. The witnesses for the state, with one exception, were professional men. Defendant depended for the most part upon farmers selected from the crowd that was coming and going during the evening. The situation was such as to invite defendant to produce all available testimony. He was charged with an offense so nearly traitorous that a rightful conviction would bring upon him and his a just and enduring shame. He should be accorded full opportunity of proving his innocence. The 12 witnesses he was allowed to use gave their testimony in one day; another day would have sufficed to have heard all. It certainly cannot be said that there was any attempt to trifle with the court or to impede the administration of justice, if one, defending against a charge brought with such serious consequences as this, demanded that another day be consumed in hearing the witnesses he produced. We think the limitation upon the number of defendant's witnesses prejudicial error for which a new trial should be granted.

In view of another trial, it is perhaps advisable to refer to one ruling upon the admissibility of certain testimony. When defendant took the stand, and after he had testified that he said nothing about the war in his first speech, he was asked to relate what he told the audience, and he proceeded to deliver his speech. After a few sentences had been given the county attorney objected, saying: "If this witness said nothing about the war in his first speech, in view of that, I don't think it is nec-

essary he goes on and repeats his speech." The objection was sustained, and defendant's counsel said: "We except to the refusal of the court to allow the defendant to state what he said and all he said at the meeting at Kenyon." We think defendant was entitled to repeat all he said at the meeting in question. The state was permitted to introduce evidence of remarks made by defendant during the meeting other than those charged in the indictment, and properly so. In fact, some of the witnesses for the state testified that the remarks set out in the indictment occurred during the first speech. The defendant should therefore have been allowed to state all he said, if he so desired. It was from all that was said by and to defendant that the jury were to determine whether the natural and reasonable effect of what he uttered was to deter his auditors from enlisting or from rendering aid in the prosecution of the war. This error was perhaps not prejudicial because, later in the trial, defendant seems to have had the opportunity to repeat as much of his speeches as he desired, without any further objection being made. The same holds true in regard to an error in striking out his testimony that he had not said anything against President Wilson or the government in his speech, for he afterwards was permitted to state that he was in perfect accord with the government and that he would champion the President until he could return from the final abode of the wicked on skates.

In view of our conclusion that the order limiting the number of defendant's witnesses was so prejudicial to his rights that a new trial must be had, we need not refer to other matters assigned as error that are not likely to again arise.

Order reversed.

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## H. WALBERG v. J. JACOBSON AND OTHERS.<sup>1</sup>

July 3, 1919.

No. 21,315.

### Contract — construction.

1. A contract for remodeling a building by which the contractor

<sup>1</sup>Reported in 173 N. W. 400.

agreed to "fix the foundations where necessary," held to impose upon him the obligation to repair the foundation and adjust it to conditions resulting from raising the building from the existing foundation; the raising of the building being one of the contemplated changes the parties had in mind in entering into the contract.

Same — extras — waiver.

2. A provision of the contract that in the event extras became necessary to complete the work they should be provided for by written agreement, was not of the essence of the contract, but a detail in the performance, and the requirement of a writing on the subject could be waived.

Same — evidence.

3. The agent of the owner of the building had authority to waive the writing, and the evidence justified the trial court in finding that he did so.

Action in the district court for Hennepin county to foreclose a mechanic's lien. The case was tried before Dickinson, J., who made findings and ordered judgment in favor of A. E. Evans against defendant Ida L. Benjamin, and a sale of the premises. From an order denying her motion for a new trial, Ida L. Benjamin appealed. Reversed.

*William B. McIntyre*, for appellant.

*Norton & Norton*, for respondent.

BROWN, C. J.

This action was brought to foreclose a mechanic's lien theretofore filed against the property of defendant Ida L. Benjamin. Defendant Evans appeared in the action and presented a lien claim in the sum of \$576.87, for labor and material furnished by him under a contract with the owner in the work of remodeling the building situated on the premises. The merits of this claim in certain respects were put in issue by the answer of Mrs. Benjamin, and a trial thereof resulted in favor of Evans, and from an order denying a new trial Mrs. Benjamin appealed.

The premises were owned by Mrs. Benjamin, and she had determined to make some alterations and changes in the building situated thereon, and to that end entered into a contract with Evans by which he undertook and agreed to furnish all material and labor for such alterations,

and to make the same for the consideration of \$800, which Mrs. Benjamin agreed to pay on the completion of the work.

The controversy in the case centers around two items in the account of Evans put forward as extra labor and material, not covered by the specifications of the contract, and for which he claims reimbursement. The items relate (1) to labor and material in repairing or readjusting the foundation of the building; and (2) to certain articles of material used in making the alterations in the building proper, which were not included in the specifications made a part of the contract.

1. The work on the foundation was performed by one Nelson, but whether he was directly employed by Evans or by Mrs. Benjamin or those representing her was a disputed question on the trial. It is however clear that Evans requested him to submit a bid for the work, and thereon he was awarded the job by some one. But we do not regard this controversy as of any special importance, for if by the contract Evans was under obligation to do the work, the cost thereof, paid by Mrs. Benjamin, should be deducted from the contract price, whether he employed Nelson or acquiesced in the performance of the work by him. Mrs. Benjamin paid Nelson, but under protest that the claim should be paid by Evans. And, as stated, if the foundation repairs formed a part of the contract for Evans to do she should have credit to the extent of the payment, for no question is raised as to the reasonableness of the amount.

We think this work clearly was imposed on Evans by the contract. It was contemplated by the parties when the contract was entered into that the building would have to be raised and leveled up, the expense of which Mrs. Benjamin assumed. It also was contemplated that raising the building would render necessary to some extent repairs on the existing foundation to make it conform to the new conditions, and they inserted in the writing a clause imposing on Evans the obligation to "fix the foundations where necessary." The record does not show that the foundation required any substantial repairs other than such as might become necessary by the alterations and changes or resulting from raising the building from the old foundation. And the only conclusion, as we view the record, is that the expression "fix foundations where necessary" had reference to that contemplated situation, and to all re-

pairs that were necessary in that respect. That view is fully supported by another clause of the contract which seems practically conclusive on the point. There seems to have been an effort in preparing the contract to guard against possible claims for extras by the contractor, and the stipulation or provision referred to, which to our minds leaves no room for fair doubt upon this branch of the case, is as follows:

"All we (Benjamin) have to pay as extras is for raising the building by mover to level it, for painting inside and outside, other decorating inside whatever may require, electric wiring, electric fixtures, any tinwork or plumbing whatever may be necessary."

It was understood that the foundation would have to be "fixed," Evans agreed to fix it, and the stipulation expressly limits the extras to those for which Mrs. Benjamin would be liable to those expressly stated therein, which does not include material for nor the labor of repairing or fixing the foundation.

We therefore hold that the learned trial court was in error in disallowing the claim of Mrs. Benjamin in respect to the foundation repairs.

1. The question whether Evans is entitled to the other items of extras is substantially one of fact, and our conclusion is that the findings of the trial court thereon are sustained by the evidence. The items were made up of labor and material necessary to complete the contemplated changes in the building, but for which no express provision was made by the contract. These the trial court was warranted in finding were authorized by the father or husband of Mrs. Benjamin, whom she had authorized to some extent to oversee and superintend the work under the Evans contract.

But counsel for Mrs. Benjamin calls attention to the following provision of the contract, namely: "Whenever there are any new extras that are not specified in this contract \* \* \* then it is to be agreed to in writing and signed by Mr. Evans and Mr. Benjamin," and it is urged that since the extras in question were not agreed to in writing, as there provided for, Evans is not entitled to recover therefor. We do not concur in that contention. The quoted provision was not of the essence of the contract, but rather a detail in the performance, intended as a check upon the contractor, to be insisted upon or waived as suited the convenience of Mrs. Benjamin or her agent. The stipulation called

for a written agreement signed by Mr. Benjamin, but his general authority to make an agreement as to extras clearly would authorize him to waive the writing. *Van Santvoord v. Smith*, 79 Minn. 316, 82 N. W. 642; *Michaud v. MacGregor*, 61 Minn. 198, 63 N. W. 479. The trial court was justified by the evidence in finding that the extras were necessary to a completion of the work, that they were authorized by the agent of Mrs. Benjamin, and that the formality of putting the matter in writing was waived. She is therefore liable. *Shaw v. First Baptist Church*, 44 Minn. 22, 46 N. W. 146, is not in point, for the facts there before the court are essentially different from those in this case.

The case as to the particular extras differs from the work on the foundation. As heretofore stated that work was an essential element of the contract, a substantive part thereof, and we find no evidence to justify the conclusion that either the husband or father of Mrs. Benjamin had authority to change or modify the contract in a matter of substance. They had no implied authority to that effect. The most that can be spelled out of the evidence is that they represented Mrs. Benjamin only in reference to matters of detail performance by Evans.

This disposes of the case and the conclusion is that Mrs. Benjamin should be given credit for the foundation items, but not as to the other items claimed by Evans as extras. There is no occasion for a new trial. The interests of both parties require that the litigation come to an end. The cause will therefore be remanded for further proceedings in harmony with the views here expressed.

Order denying a new trial reversed.

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EDWARD F. BERKNER v. O. J. OLSON.<sup>1</sup>

July 3, 1919.

No. 21,319.

**Bills and notes — former judgment not a bar to action.**

The finding that a former adjudication between the parties is not a bar to any of the causes of action stated in the complaint herein is sustained by the record.

<sup>1</sup>Reported in 173-N. W. 568.

Action in the district court for Brown county to recover \$102.68 upon four promissory notes. Defendant interposed a counterclaim. The case was tried before Olsen, J., who made findings and ordered judgment in favor of plaintiff. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

*Albert Hauser*, for appellant.

*Pfaender & Erickson*, for respondent.

HOLT, J.

Berkner, the plaintiff, sued upon four small promissory notes made by Olson, the defendant. The notes were not executed at the same time. The aggregate amount due was \$102.68, and some interest. Olson pleaded a prior adjudication in bar, and also a counterclaim. The court found none of the four causes of action barred by the judgment in the former suit. A portion of the counterclaim was held valid, and deducting that from the amount due on the notes left a balance in favor of Berkner, for which judgment was entered. Olson appeals.

The only question presented is whether the finding that the former adjudication constituted no bar is sustained by the record. The answer sets out in full the pleadings in the former suit and alleges that, at the trial thereof, the notes were in issue and were received in evidence, and that judgment was entered in favor of Olson on the merits.

The pleadings so set out disclose that the action was brought by Olson to recover the value of 250 bushels of corn, alleged to have been wrongfully converted by Berkner. The answer was that Olson was Berkner's tenant under a written lease by the terms of which a farm was let to Olson on shares, the crops raised to belong to Berkner until harvested and a division thereof had been made, and that Berkner had the right to enter the farm and possess himself of enough of Olson's share of the crops to reimburse Berkner for all advances made to Olson. The answer also alleged that Olson had raised the corn mentioned in the complaint under the lease; that there had been no division of the crops; that Olson had violated the terms of the lease; that Berkner had advanced and paid to Olson for his use while such tenant moneys and property of the value of \$280, which amount was owing at the time the corn mentioned in the complaint was taken by Berkner; that he took



the corn under the provisions in the lease to reimburse himself for the moneys so advanced, and that the corn taken did not exceed in value the sum of \$150. There was a verdict in the sum of \$129.37 in Olson's favor. The judgment entered upon the verdict has been satisfied.

Clearly an adjudication of the four causes of action set forth in the complaint in this case is not shown by an introduction of the judgment roll in the former action, for no mention of any note is found either in the pleadings or the judgment. The burden was upon Olson, who pleaded the former adjudication in bar, to prove that each cause of action, or each note, entered into, or properly should have entered into the verdict rendered therein. Even if it be conceded that the verdict in the former case cannot be explained upon any other hypothesis than that one or more of the notes were applied in its reduction, they could not all have been so applied, and it is impossible to determine which one was. Hence the defendant Olson has failed to sustain his plea as to any one of the four causes of action.

The printed record, although certified as containing all the evidence, clearly shows that the stenographic record of the testimony in the former action was received in this trial, but no part thereof is here. All we have, outside of the pleadings above summarized, is the testimony that the four notes were offered and received in evidence. And we have also the court's charge in the former case, wherein the jury were instructed, in substance, not to consider the notes or any of the alleged \$280 indebtedness, if they found that the corn crop had been divided, and that the corn taken by Berkner was the corn that had been set apart as Olson's share. In that event there should be a verdict for Olson for the full value of the corn taken. If they found there had been no division, Berkner had the right under the lease to take away and retain enough of the crop in question to repay "the advances made and any debt due him from plaintiff (Olson) at the time the corn was taken, and in such case he did not need any attachment or other papers for that purpose. If you find such to be the facts then it becomes necessary for you to determine, from the evidence, the amount that the plaintiff, Olson, was indebted to defendant, Berkner, for advances and on account of the notes and on all accounts on November 16, 1916, at the time this corn was taken, and to offset such indebtedness against the

market value of the corn taken, as you find such value to have been." The jury were not permitted to find a verdict against Olson in case his indebtedness to Berkner exceeded the value of the corn taken. The indebtedness in whatever form could be used only as a set-off, if it was found that there had been no division. The court also told the jury that the only evidence as to market value of the corn was 77 cents per bushel.

The argument of appellant is that, the verdict being for less than the market value and less than the admitted value, necessarily the jury determined that there had been no division and hence set off some of the indebtedness claimed by Berkner from Olson. But the question is, has Olson proven in this action that it was any one of the four notes in suit rather than the alleged indebtedness apart from the notes? We think not. Nor are we prepared to say that the learned trial court's finding, that none of the causes of action are barred by the prior adjudication, is not sustained on the theory that the jury found a division of the corn had been made, in which case all matters of offset were indirectly withdrawn from the suit.

Had the indebtedness alleged in the answer in the former suit been in the same amount as one of the notes, and had there been testimony showing that that note had been introduced in evidence, the conclusion, perhaps, would be inevitable that it entered into the verdict where, as here, it was for an amount less than the admitted value of the corn converted. But such is not the case. The offset pleaded was twice the aggregate amount of the notes received in evidence, and each note is a separate cause of action. It is therefore an impossibility to prove which cause of action, or note, if any at all, was used as a set-off. The claims or notes not so used were, by the instructions of the court, eliminated from the case. It is to be noted that the issue upon these notes in the former action was not submitted to the jury except conditionally, and the present record does not show that the condition ever arose for the jury to consider either all or any one of them.

The order must be affirmed.

STATE v. CHARLES SCHURZ AND ANOTHER.<sup>1</sup>

July 3, 1919.

No. 21,333.

**Bills and notes — striking out answer — judgment on pleadings.**

In an action by the state to recover upon a promissory note given for binding twine under a contract executed pursuant to G. S. 1913, § 9313, *held*, that the court below erred in striking from the answer allegations of a modification of the contract pursuant to which the note was given, and for judgment upon the pleadings as asked for in the complaint.

Action in the district court for Lyon county to recover \$8,800 on a promissory note. The facts are stated in the opinion. Plaintiff's motion to strike out from defendant's answer the allegations quoted at the beginning of the opinion, and for judgment on the pleadings, was granted, Clague, J. From the order striking out that portion of the answer and granting judgment on the pleadings, defendants appealed. Reversed.

*Seward & Molle*, for appellants.

*Clifford L. Hilton*, Attorney General, and *John E. Palmer*, Assistant Attorney General, for respondent.

QUINN, J.

During the years 1917 and 1918, the defendant Charles Schurz was engaged in the implement business at Amiret, this state, during which time he handled farm machinery and binding twine manufactured at the state prison. In October, 1917, he entered into a contract with the warden of the prison to purchase 40,000 pounds of binding twine for the season of 1918, and to pay cash or give a satisfactory note therefor due November 1, 1918, without interest, prior to the shipping of the twine. On May 2, 1918, defendants executed their joint promissory note therefor, payable to C. S. Reed as warden, in the sum of \$8,800. On the first of June, 1918, a carload of twine was shipped from the prison to Charles Schurz pursuant to contract. At that time Thomas

<sup>1</sup>Reported in 173 N. W. 408.

Hunting was in the employ of the plaintiff in the handling of its output of twine and implements. Upon the arrival of the car of twine at Amiret, Hunting was there. Schurz removed 20,000 pounds of twine from the car and permitted Hunting to ship the balance to Wilder, Minnesota, where he sold it to Malchow Brothers, receiving therefor a draft payable to himself for \$3,355, which he appropriated to his own use.

In the answer the defendants admit the giving of the note as alleged in the complaint, and as an affirmative defense thereto allege:

"That shortly after the first day of June, 1918, and after the said twine had arrived in car at said Amiret, Minnesota, and before the said twine was removed from said car, this plaintiff, by and through its duly authorized agent, Thomas Hunting, represented and stated to the said Charles Schurz that there was a considerable shortage of twine for the said season of 1918, and that the output of twine by this plaintiff was insufficient to supply the dealers and farmers of the state of Minnesota for said season of 1918, and that on account thereof it was the desire of this plaintiff that the said Charles Schurz should reduce the amount of his said order under said contract to twenty thousand pounds instead of forty thousand pounds, and allow plaintiff to reship the extra twenty thousand pounds to other dealers and farmers, and in consideration of the said Charles Schurz so reducing his said order under said contract from forty thousand pounds to twenty thousand pounds, and allowing plaintiff to so reship the said extra twenty thousand pounds of said twine, this plaintiff, by its said duly authorized agent, then and there promised and agreed to credit these defendants as payment upon said promissory note, the amount of the fixed or contract price for the twine so reshipped.

"That thereupon, induced by said statements and representations and relying upon said promise and agreement, the said Charles Schurz consented to the reduction of his said order under said contract from the said forty thousand pounds to the said twenty thousand pounds, and to the reshipment by plaintiff to other dealers and farmers of the said extra twenty thousand pounds of said twine. That thereupon, and before the said twine was removed from the said car, plaintiff, by its said duly authorized agent, Thomas Hunting, then and there took over from the defendant Charles Schurz, the said extra twenty thousand pounds of

said twine, and assumed complete possession and ownership thereof and shipped the same to other dealers and farmers. That it has been the custom of the agents of this plaintiff, during many years last past, and especially during the years 1917 and 1918, to take and receive twine and farm implements from one dealer and reship the same to dealers and farmers in other territory, the better to accommodate the dealers and farmers of Minnesota, crediting or paying to the dealers from whom the same was taken the fixed or contract price of the twine or farm implements so taken; and such custom was with the full knowledge, consent and approval of this plaintiff. That the twine so taken from the said Charles Schurz and reshipped, as aforesaid, at the fixed or contract price thereof, was of the value of thirty-three hundred fifty-five dollars; and that by plaintiff's so taking and reshipping said twenty thousand pounds of said twine there was paid and should be credited upon said note as payment thereon, the full sum of thirty-three hundred fifty-five dollars, and the consideration for said note has thereby failed to the extent of the said sum of thirty-three hundred fifty-five dollars."

Plaintiff moved to strike from defendants' answer all affirmative matter above set forth upon the ground that the same is irrelevant, redundant and constitutes neither a defense nor counterclaim in said action, and for judgment on the pleadings as asked for in the complaint. The motion was in all things granted. The sole question presented for determination is, whether the answer, upon its face, stated a defense to the cause of action set forth in the complaint. The motion was submitted upon the complaint, answer, the files and records in the case and certain affidavits.

This action is based upon a promissory note given for binding twine under a contract executed pursuant to the provisions of G. S. 1913, § 9313.

The controversy arises from an alleged modification of the contract pursuant to which the note sued upon was given. Such a modification of the contract, if made as alleged, constitutes a good defense to the note, to the extent of the twine so reshipped. It is well settled that, in an action by the state for the recovery of money, the defendant may in defense assert any claims which are connected with and arise out of

the transaction sued upon. *State v. Holgate*, 107 Minn. 71, 119 N. W. 792.

The statute regulating the handling of twine manufactured in the prison, provides that the same shall be sold to actual consumers in quantities needed for their use, and to dealers within the state, under such rules and regulations as may be provided by the board of control, for cash or security, approved by the warden. It also provides that the state shall retain a contingent interest in twine so sold, and if any dealer shall violate his agreement, the board may declare such twine forfeited to the state and retake possession thereof. But we find no provision anywhere in the statute which prevents the board or the warden, with the consent of the dealer, from modifying a contract as to the amount of twine which may be delivered thereunder.

If, as alleged in the answer, the plaintiff received through its duly authorized agent 20,000 pounds of the twine so shipped before it was removed from the car, and reshipped the same to another dealer, and such agent received payment therefor, we can see no good reason why the defendant should not have credit on his note for the amount of such twine. That is just what the answer charges that the plaintiff did. There is no allegation in the answer, as contended for on the part of the state, that the defendant either resold in bulk or reshipped the 20,000 pounds in question. Nor should the authority of Hunting under his employment be litigated and determined upon affidavits on a motion of this character. The question of the authority of plaintiff's agent may become an issue for determination upon the trial, but the question here presented is one of pleading. A motion for judgment on the pleadings is in the nature of a demurrer and admits the facts well pleaded. *Dunnell*, Minn. Pl. § 463. We think the learned trial court erred in striking the allegations herein set forth from the answer, and in ordering judgment for the plaintiff.

Reversed.

JOHN SANTRIZOS v. PUBLIC DRUG COMPANY.<sup>1</sup>

July 3, 1919.

No. 21,356.

**Landlord and tenant — constructive eviction.**

1. When the beneficial enjoyment of leased premises is so interfered with by the lessor as fairly to justify an abandonment by the lessee there is a constructive eviction. It does not suppose an actual ouster or dispossession by the lessor.

**Same — evidence.**

2. The plaintiff conducted an extensive fruit, confectionery, cigar and flower store. He sublet a space 10 by 49 feet to the defendant for use as a drug store. There was no separation of the portion leased. The defendant, claiming a constructive eviction, abandoned the premises and refused to pay rent. It claimed that there was a constructive eviction by the shutting off of the lights, by the obstruction of its space, by a weighing machine, by the refusal of the plaintiff to furnish it a key, by the interference with its business by mechanical and other music, and by petty gambling and disorder, all in the plaintiff's portion of the store. It is *held* that the evidence did not require a finding of facts constituting a constructive eviction.

Action in the district court for Hennepin county to recover rent of certain premises and to restrain defendant from removing wall cabinets or fixtures installed therein and attached to the building or connected with the remainder of the fixtures of plaintiff. The case was tried before Fish, J., who made findings that the lease between plaintiff and defendant was in full force and effect, and ordered judgment in favor of plaintiff for \$4,200, with interest upon the several monthly instalments as they became due, together with \$25 disbursed by plaintiff in placing the premises in a safe condition. Defendant's motion for amended and additional findings was denied. From an order denying its motion for a new trial, defendant appealed. *Affirmed.*

*Selover, Schultz, & Selover*, for appellant.

*G. A. Will*, for respondent.

<sup>1</sup>Reported in 173 N. W. 563.

DIBELL, J.

Action to recover rent on a lease tried to the court without a jury. There were findings for the plaintiff and the defendant appeals from the order denying its motion for a new trial.

1. The plaintiff Santrizos is the lessee from the Hennepin Holding Company of the premises at 601 Hennepin avenue, Minneapolis. He conducts therein a fruit, confectionery, cigar and flower store, serves lunches, and in general the store has the usual accompaniments of such stores. He leased to the defendant drug company a space along the Sixth street side of the store 10 by 49 feet, of which  $2\frac{1}{2}$  feet along the length together with the adjoining  $2\frac{1}{2}$  feet of the plaintiff were to be used as a common aisle. The defense is that the drug company was constructively evicted by the acts of Santrizos in the conduct of his business. A constructive eviction occurs when the beneficial enjoyment of the premises by the lessee is so interfered with by the landlord as fairly to justify an abandonment. It does not suppose an actual ouster or dispossession by the lessor. 2 Tiffany, Landlord & Tenant, § 185; 2 Underhill, Landlord & Tenant, § 676; 16 R. C. L. p. 686, § 171, et seq.; 2 Words & Phrases (1st ser.) 1470; 1 Words & Phrases (2d ser.) 931.

Cases illustrating the application of the general rule to different situations are readily accessible. Notes 5 L.R.A.(N.S.) 855; 37 L.R.A.(N.S.) 1217; 7 Ann. Cas. 591, 593; 19 Ann. Cas. 688, 690; Ann. Cas. 1916B, 121, 123; 12 Dec. Dig. Landlord & Tenant, § 172 (2); 32 Cent. Dig. Id. § 696.

2. The definition of what constitutes constructive eviction does not get us far. Usually the question whether there is a constructive eviction is one of fact with each case largely dependent upon its particular circumstances.

The portion of the store rented to the defendant was not separated from that used by the plaintiff. They both did business in a common room with the defendant using the portion allotted to it and the plaintiff using the rest. The defendant had a chain of drug stores in the business portion of the city and this was one of them.

The defendant alleges many acts of the plaintiff which, all taken together, it claims justified it in abandoning the premises. It claims that



the plaintiff shut off the lights; that he put in a weighing machine which obstructed the premises; that he refused it a key; that there was interference from music and noise in the portion of the store occupied by the defendant, and that the plaintiff permitted gambling and disorder.

The evidentiary facts are much in dispute. The shutting off of the lights in any substantial way was denied by the plaintiff and the court found against the defendant. Some of the complaint was of a time when the use of heat and light was restricted as a war measure. It seems that the weighing machine intruded upon the space allotted to the defendant. There is evidence that it did and that it did not interfere materially with the defendant's business, and there is evidence each way as to whether complaint was made. It was an attraction commonly found in drug and confectionery and other stores desirous of attracting patronage. The court found that the refusal of a key did not result in harm of consequence. The store was open from seven in the morning until after twelve at night and only on a few occasions was the defendant caused inconvenience. There was mechanical and other music intended to invite and entertain patrons of the plaintiff. He catered to after-theater crowds and his patronage was more popular than exclusive. The evidence is not such as to require a finding that the defendant was appreciably injured by it. There is claim of disorder. The evidence is not such as to require a finding that it was substantial and the court found that it was not. There is evidence of some gambling. Patrons indulged at the cigar stand in shaking dice for cigars and in other forms of petty gambling which appeal to some people and which is intermittently interrupted by the authorities. It was such as to justify the holding company in revoking the plaintiff's lease, under the provision in it, but it made no objection. *Zotalis v. Cannellos*, 138 Minn. 179, 164 N. W. 807, L.R.A. 1918A, 1066. There was no provision in the lease from Santrizos to the drug company giving it a right of cancelation for such practice by its lessor.

The case was tried thoroughly and the evidence is voluminous. We have read it all. It supports the finding of the court that the acts of the plaintiff were not such as to justify the defendant in abandoning the premises.

We have examined the authorities cited by counsel for the defendant but a review of them here would not be useful.

Order affirmed.

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OLOF DALE v. J. L. JOHNSON.<sup>1</sup>

July 3, 1919.

No. 21,442.

**Certificate of election — mandamus — writ denied for violation of statute.**

In mandamus where the relator, a candidate for a public office, has violated a provision of the statute so as to render it unlawful for the auditor to issue to him a certificate of election, the writ will be denied, however meritorious the application may be on other grounds.

Upon the petition of Olof Dale, the district court for Renville county granted its alternative writ of mandamus directed to J. L. Johnson, as county auditor of that county, commanding him to issue to petitioner a certificate of election to the office of county commissioner of the second commissioner district or show cause why he had not done so. The matter was heard by Daly, J., who discharged the writ. From the judgment discharging the writ, petitioner appealed. Affirmed.

*A. C. Dolliff*, for appellant.

*Harold Baker*, for respondent.

QUINN, J.

Mandamus to compel the respondent county auditor to issue to relator a certificate of election to the office of county commissioner. The trial court, after hearing, made findings of fact and ordered judgment dismissing the proceeding. Judgment was so entered and relator appealed. There is no settled case or bill of exceptions, but it appears from the findings that the relator was a qualified voter of the second commissioner district of Renville county, and that his name was upon the official ballot as one of three candidates for the office of commissioner of such district to be voted for at the general election on November 5, 1918. The county

<sup>1</sup>Reported in 178 N. W. 417.

election canvassing board, after canvassing the vote for that office, returned that the relator received 353 votes, Charles Lammers 275, and Edward Bleick 183, which were all the votes cast for said office at such election, but refused to certify or declare relator elected to such office; that the respondent as such county auditor refused to issue to relator a certificate of election upon demand, though tendered the proper fee; that the appellant as a candidate of such office disbursed the sum of \$14.78 for political purposes and failed to file a financial statement thereof as required by law. Section 514, G. S. 1913, provides that the board, having completed its canvass, shall declare the person receiving the highest number of votes for each county office duly elected thereto, and section 515 provides that the county auditor shall make for every officer elected therein a certificate of such election, and deliver the same to the person entitled thereto upon demand. It is not contended upon either side of this controversy that the canvassing board has power to pass upon the question of whether a candidate for office has violated any law. While the duty of the county auditor is to issue a certificate of election to the candidate receiving the highest number of votes, and duly declared elected thereto, yet he will not be compelled by mandamus to violate the criminal laws of the state in the performance of such duties.

Section 585, G. S. 1913, provides that every candidate shall, on the second Saturday after making his first disbursement, and thereafter on every second Saturday of each month, and also on the Saturday preceding any election day, file a verified financial statement, accounting for all expenditures made by him. Sections 604 and 607 provide penalties in the nature of fines and imprisonment for a violation of the foregoing statute. Section 630 provides that "every officer who issues a commission or certificate of election to any person before such statement shall have been so filed, shall be guilty of a gross misdemeanor."

To entitle the relator to the relief sought, he should come into court with a clear record. *State v. U. S. Exp. Co.* 95 Minn. 442, 104 N. W. 556. Where it appears that the applicant has violated a provision of the statute so as to render it unlawful for the auditor to issue to him the certificate asked for, the writ will be denied, however meritorious the application may be on other grounds. 2 Dunnell, Minn. Dig. § 5758. It was the duty of the relator to file his financial statement with the county

auditor, and that officer will acquaint himself sufficiently with his office and the records therein to avoid violating the criminal laws of the state. The duties of the canvassing board are not involved. The judgment appealed from is affirmed.

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JOHN H. GOWAN, AS FATHER OF JOHN GOWAN, JR., A MINOR v. WILLIAM G. McADOO, DIRECTOR GENERAL OF RAILROADS.<sup>1</sup>

July 11, 1919.

No. 21,265.

**Railway — grade crossing — negligence of defendant.**

1. Railroad companies are required by G. S. 1913, §§ 4256, 4257, to maintain grade crossings in a safe and passable condition, easy for teams and vehicles to cross, and to maintain planks between the rails level with the tops of the rails. The planking at a crossing was below the required level and the runners of a sleigh driven over it would stick on the rails, thus retarding its motion. *Held* that if, as a consequence of the condition described, an occupant of a sleigh was injured because it was delayed in getting over the crossing in time to escape being struck by an approaching train, the railroad company would be liable to him for negligence in the maintenance of the crossing.

**Same — duty of company to keep sharp watch.**

2. A vigilant outlook should be kept in operating trains where the presence of persons on or near the track is to be anticipated as reasonably probable, notwithstanding the fact that a railroad company has the right of way at highway crossings. This right of precedence does not impose upon the traveler the whole duty of avoiding collisions, but both parties must exercise reasonable care to prevent injury.

**Same — evidence of negligence of train men.**

3. A jury may properly find that a train was negligently operated if it was run at a high rate of speed over a much traveled village highway crossing where it struck a sleigh, which neither the engineer nor fireman observed until the team was on the track, although for a mile north of the crossing the track was straight, the train was running south, the

<sup>1</sup>Reported in 173 N. W. 440.

team was approaching the crossing at a walk and might have been seen by the fireman after it reached a point 21 feet from the track.

**Same — gates at grade crossing — question for jury.**

4. Whether, in the exercise of reasonable care, a railroad company should maintain gates, a bell, or a flagman at a grade crossing, depends upon the circumstances of each particular case and may present a question for the jury; even though the maintenance thereof is not required by any statute, ordinance or order of the Railroad and Warehouse Commission.

**Action by injured child — negligence of driver and of company.**

5. The fact that the driver of a vehicle used to carry school children to and from school, was guilty of negligence in driving upon a railroad track at a highway crossing, does not defeat a recovery against the railroad company by a child injured because the engine struck the vehicle, if the company was also guilty of negligence which concurred with that of the driver to bring about a collision and it would not have taken place but for such concurring negligence.

**Special findings sustained by evidence.**

6. The evidence sustains the special findings of the jury and there were no errors in the instructions given by the court.

**Substitution of Director General of Railroads as defendant.**

7. Following *Lavalle v. Northern Pacific Ry. Co.* supra, page 74, it is held that the court erred in dismissing the action as to the railroad company, which was named as the original defendant, and substituting the Director General of Railroads as defendant.

Action in the district court for Carlton county, to recover \$3,000 for injuries received by plaintiff's minor son. The answer alleged that the driver of the vehicle was incompetent and that his carelessness and negligence caused the collision. The case was tried before Dancer, J., and a jury which answered in the affirmative these questions: Whether defendant was negligent in the maintenance of the planking between the rails; whether defendant gave proper signals by blowing the whistle and ringing the bell; whether the train was run at a negligent rate of speed; whether defendant was negligent in failing to have a safety gate or flagman or crossing bell at the crossing; whether both the engineer and fireman, or either, were negligent in failing to keep a proper lookout, and questions whether each of these omissions or acts was a direct and proximate cause of the accident; and returned a verdict for \$3,000. Defend-

ant's motion to amend the verdict by substituting William G. McAdoo, Director General of Railroads, as defendant, and that the action be dismissed as to the Northern Pacific Railway Company was granted. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. From an order substituting the Director General of Railroads as defendant and dismissing the action as to the railway company, plaintiff appealed. Affirmed on defendant's appeal; reversed on plaintiff's appeal.

*Charles Donnelly and D. F. Lyons, for appellant.*

*Tautges, Bissell & Wilder, for respondents.*

LEES, C.

At Barnum in this state, on February 1, 1918, a sleigh carrying school children to their homes was struck at a grade crossing by the engine of a passenger train of the Northern Pacific Railway Company. Seven of the children were killed and others were injured. A number of actions were brought against the company on account of the accident. Among them was one by plaintiff in behalf of his minor son, who was injured. There was a verdict in his favor, and defendant appeals from an order denying a new trial.

After the verdict was returned, on the application of the railway company, an order was entered dismissing the action as to it and substituting William G. McAdoo, as Director General of Railroads, as defendant. From this order, plaintiff appeals.

There were five charges of negligence. Each was submitted to the jury for a special finding with reference thereto. It was found: (1) That defendant was negligent in maintaining the planking at the crossing; (2) in running its train at a negligent rate of speed; (3) in failing to have a safety gate, flagman, or bell at the crossing; (4) that either the engineer or fireman negligently failed to keep a proper lookout as the train approached the crossing, and that each of the acts or omissions above specified was a proximate cause of the accident; (5) that the whistle was blown and the engine bell kept ringing as the train approached the crossing. Each of these findings except the last is attacked by the defendant.

The following instruction was given: "Plaintiff must prove at least that the defendant was negligent in one of these five respects, and that negligence in that particular respect was a direct and proximate cause

of the accident," and the further instruction that, if such proof was made, plaintiff was entitled to recover. No exception to these instructions was taken and their correctness is not questioned on this appeal.

The statute requires railroad companies "to construct and maintain \* \* \* sufficient crossings," wherever their lines cross a public highway. Planks must be laid between the rails and their surface must be level with the top of the rails. Crossings must be kept "in a safe and passable condition \* \* \* easy for teams with loads and other vehicles" to cross. G. S. 1913, §§ 4256, 4257. A number of witnesses testified that at the place of the accident the planks were 1 or 1½ inches below the top of the rails, and that, in driving across the track with a load, the runners of a sleigh would stick on the rails. There was no direct evidence that this happened at the time of the accident, but the jury might infer that it did because it happened on previous occasions.

Some of the witnesses estimated the speed of the train at the time of the accident at 40 miles per hour; others at 60 miles per hour. Its last stop before reaching Barnum was at Carlton. It left there nine minutes late. It was scheduled to leave at 3:08 p. m. and to reach Barnum at 3:34 p. m. The distance between the two stations is 18 miles. About two minutes of the lost time was made up on the run between them.

Barnum has a population of about 400. All travel to and from the territory west of the village passes over the crossing where the accident occurred. The driver of a vehicle coming from the east would have his view of the track to the north obstructed by cattle pens and by some lumber and pulpwood piled on the right of way near a sidetrack on the day of the accident. The day was windy and there was some snow in the air. There was no crossing bell, gate or flagman.

There are 19 assignments of error. They are principally addressed to the question of the sufficiency of the evidence to justify a finding that defendant was negligent in any respect.

1. If the crossing was in the condition described by plaintiff's witnesses, it is evident that a loaded sleigh could not pass over it as quickly and easily as though the planks were level with the rails. Its progress would be appreciably delayed by the sticking of the runners on the rails. The sleigh had almost gotten over the track when it was struck, and the jury might well find that its progress was retarded enough to prevent it from

getting safely over and that, if it had not been so retarded, there would have been no accident. *Belshan v. Illinois Central R. Co.* 117 Minn. 110, 134 N. W. 507.

2. There was a space of 21 feet between the main track and the track east of it leading to the stock pens over which the fireman on an engine running south would have an unobstructed view. As the team and sleigh were approaching the crossing they could have been seen by the fireman after the train reached a point about one mile north of the crossing. His testimony was that he did not see the horses until just as they came on the main track, while the engineer testified that he did not see them until their heads came up by the engine on his side and that the crash came before he could apply the brakes, although he applied them as soon as he saw the horses. The jury could have found that the train was running at the rate of 60 miles per hour. If it was, it would take one minute to cover the one mile stretch of straight track north of the crossing. While running that distance the fireman failed to see the team until it was too late to avert the accident. The team must have been within his range of vision after it reached a point 21 feet east of the crossing. The evidence showed that the horses were walking at a moderate pace as they came up to the crossing. There was basis enough in these facts for a finding that the train was run at an excessive rate of speed and without keeping such a lookout as the circumstances required. *Miller v. Minneapolis & St. Louis R. Co.* 106 Minn. 499, 119 N. W. 218; *Kommerstad v. Great Northern Ry. Co.* 128 Minn. 505, 151 N. W. 177; *Lawler v. Minneapolis, St. P. & S. S. M. Ry. Co.* 129 Minn. 506, 152 N. W. 882; *Zenner v. Great Northern Ry. Co.* 135 Minn. 37, 159 N. W. 1087. It is generally held that a vigilant lookout should be kept in operating trains where the presence of persons upon or near the track should be anticipated as reasonably probable. *Chicago, B. & Q. R. Co. v. Cauffman*, 38 Ill. 424; *Johnson v. Chicago & N. W. Ry. Co.* 49 Wis. 529, 5 N. W. 886; *Smith v. Norfolk & S. R. Co.* 114 N. C. 728, 19 S. E. 863, 923, 25 L.R. A. 287; *Illinois C. R. Co. v. Murphy's Admr.* 123 Ky. 787, 97 S. W. 729, 11 L.R.A. (N.S.) 352.

Owing to the momentum of trains and the necessities and public nature of railroad traffic, a railroad company has the right of way at highway crossings. *St. Paul Southern Electric Ry. Co. v. Flanagan*, 138



Minn. 123, 164 N. W. 584. And its engineers and firemen have the right to assume that an adult on or approaching the track will exercise due care to avoid injury. But the right of precedence which the company possesses does not impose upon the traveler the whole duty of avoiding collisions. Both parties must exercise reasonable care to prevent injury. *Continental Improvement Co. v. Stead*, 95 U. S. 161, 24 L. ed. 403; *Purinton v. Maine C. R. Co.* 78 Me. 569, 7 Atl. 707; *Lehigh Valley R. Co. v. Brandtmaier*, 113 Pa. St. 610, 6 Atl. 238; 3 Elliott, Railroads, § 1153. In the case at bar, if the fireman had kept a proper lookout, he should have observed that the driver of the team, oblivious of imminent danger, was about to cross the track in front of the swiftly oncoming train. Had he observed this, the speed of the train might have been slackened enough to avert the collision.

3. The law relating to the duty of a railroad company to maintain gates or a crossing bell, or keep a flagman at highway crossings, was recently considered in *Zenner v. Great Northern Ry. Co.* and *Lawler v. Minneapolis, St. P. & S. S. M. Ry. Co.* supra. The facts in those cases were unlike those in the case at bar. In the former, the usual train signals were given but the crossing was the busiest in a city of 10,000 inhabitants. In the latter, it did not appear that any signals were given as the crossing was approached. Here, the usual signals were given and the crossing was located in a village with less than 500 inhabitants. Under these circumstances the court left it to the jury to determine whether ordinary care required the company to maintain gates, a bell or a flagman at this crossing. This was correct in view of the principles stated in the *Zenner* case. While it is true that neither by statute nor by order of the Railroad and Warehouse Commission was the company required to maintain a crossing bell, or any other means of warning travelers of the approach of its trains, it must be remembered that the statutes only prescribe the minimum of care required. Whether it exercised the required degree of care in view of the location of the crossing, the conditions surrounding its maintenance and the rate of speed at which trains were run over it, was a question for the jury to pass upon. 3 Elliott, Railroads, § 1157.

4. The contention most strenuously made by defendant is in substance this: The sleigh was in charge of one Carl Miller, who was under con-

tract with the school district to transport children living west of Barnum to and from school. The body of the sleigh was covered with canvas. There was a door in the rear and one in front with two panes of glass in it through which the driver had a view of the road ahead of him. There were no openings of any sort in the sides. It was impossible for the driver, who sat inside the inclosure, to see to the right or the left, except within the limited angle of vision permitted by the glass in the door in front of him. Seated on a chair behind the door, Miller drove upon the crossing, unable to look up or down the track, without stopping to send one of the children ahead to look for a train. A witness testified that the arm of the semaphore north of the crossing was down and that Miller's attention was called to it, but he did not stop. He himself testified that he did not see or hear the train before it was upon him, when his horses plunged ahead to get over the track, but failed to pull the sleigh completely over before the engine crashed into it.

Of Miller's gross negligence there can be no question, but, while his responsibility for the disaster is apparent, it was not brought about solely by reason of his negligence or by reason of the negligence of those who permitted a vehicle covered as this was to be used in carrying school children almost daily across a railroad track. It is well settled that where the negligence of two persons concurs in causing an injury to another and such injury would not have been suffered but for the negligence of both, each is liable to the person injured. 2 Dunnell, Minn. Dig. § 7006. This court has recently stated the rule as follows: "Where several concurring acts or conditions, one of them a wrongful act or omission, produce an injury, such wrongful act or omission is to be regarded as the proximate cause of the injury, if it be one which might reasonably have been anticipated from such act or omission, and which would not have occurred without it. *Vills v. City of Cloquet*, 119 Minn. 277, 138 N. W. 33. See also *Bibb Broom Corn Co. v. Atchison, T. & S. Fe Ry. Co.* 94 Minn. 269, 102 N. W. 709, 69 L.R.A. 509, 110 Am. St. 361, 3 Ann. Cas. 450, and *Fairchild v. Fleming*, 125 Minn. 431, 147 N. W. 434.

5. We find no error in the rulings of the trial court or in the instructions to the jury to which other assignments of error are directed, and conclude that the motion for a new trial was properly denied.

6. Plaintiff's appeal from the order substituting the Director General of Railroads as defendant presents the question decided in and is controlled by *Lavalle v. Northern Pacific Ry. Co.* supra, page 74.

The order denying the motion for a new trial is affirmed and the order dismissing the action as to defendant railway company and substituting the Director General of Railroads as defendant is reversed.

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**MATHILDA DAHLSIE v. C. A. HALLENBERG AND ANOTHER.<sup>1</sup>**

July 11, 1919.

No. 21,267.

**Assault — verdict supported by evidence.**

1. The evidence is sufficient to sustain a verdict for damages for assault.

**Same — punitive damages — malice of incompetent.**

2. The fact that the probate court had appointed a guardian of the person and estate of defendant, is not conclusive evidence of his inability to entertain malicious intent, and the court properly submitted the question of punitive damages to the jury.

Action in the district court for Clay county to recover \$6,000 for assault. The facts are stated in the opinion. The case was tried before Parsons, J., who when plaintiff rested denied defendants' motion to dismiss plaintiff's cause of action for assault, on the ground there was no evidence to sustain the allegation of the complaint, and a jury which returned a verdict for \$500. From an order denying their motion for a new trial, defendants appealed. Affirmed.

*Edgar E. Sharp* and *N. I. Johnson*, for appellants.

*F. H. Peterson*, for respondent.

HALLAM, J.

This is an action for assault. Plaintiff had a verdict. Defendant appeals. Two questions are raised. The first contention is that the evi-

<sup>1</sup>Reported in 173 N. W. 433.

dence of assault is not sufficient to sustain the verdict; the second is that the court erred in submitting the question of punitive damages to the jury.

1. Plaintiff was employed by defendant as housekeeper. The testimony as to the alleged assault is in conflict. The only direct evidence is that of plaintiff on one side and defendant on the other. Plaintiff's testimony makes out a case of assault. There are some circumstances having a more or less remote bearing as corroboration. Defendant earnestly contends that plaintiff's story is so inherently improbable that the verdict should not be allowed to stand. We have carefully considered all the evidence and we are of the opinion that it fairly presents a question of fact for the jury, and that the verdict should not be disturbed.

2. At the time of the assault defendant was over 80 years old. He had been adjudged by the probate court to be incompetent and unable to care for and manage his property, and a guardian of his person and property had been appointed. The court submitted to the jury the question of punitive damages. He submitted to them the question "whether the defendant was mentally capable of making a wilful and malicious assault," and in substance instructed them that punitive damages could not be awarded if defendant's mental condition was such that he did not realize the nature of his act. Defendant contends that punitive damages cannot properly be given against a person under guardianship.

Our statutes, G. S. 1913, § 7433, authorize the appointment of a guardian of any person who, by reason of old age, loss or imperfection of mental faculties, is incompetent to have the management of his property. This court has held in substance that a judgment or order in proceedings for the appointment of a guardian of an incompetent person, taking from him the management of his property, is not conclusive evidence of his incapacity to make a will. *McAllister v. Rowland*, 124 Minn. 27, 144 N. W. 412, Ann. Cas. 1915B, 1006. See also *Woodville v. Morrill*, 130 Minn. 92, 153 N. W. 131. The purpose of the inquiry in the proceeding for the appointment of a guardian is to determine capacity to manage property and transact business. The determination is in no sense a determination of the question of mental inability to commit a wilful or malicious assault. The order in the guardianship proceeding was evidence to be considered by the jury as bearing upon defendant's abil-

ity to entertain a malicious intent, but it was not conclusive of his inability to do so. The court properly submitted the question of punitive damages to the jury.

Order affirmed.

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STATE BANK OF COMMERCE v. KENNEY BAND  
INSTRUMENT COMPANY AND OTHERS.<sup>1</sup>

July 11, 1919.

No. 21,274.

**Corporation — overvaluation of property received for stock — recovery of excess value from stockholders.**

1. Stockholders receiving stock partly bonus because issued to them fully paid in return for greatly overvalued property will be compelled to pay the difference between the value of what they gave and the par of the stock received, if such difference is required to pay the claims of subsequent creditors who have actually or presumably relied upon the stock as fully paid. This liability of the stockholders is founded upon fraud.

**Same — enforcement of liability by creditors of bankrupt corporation.**

2. Subsequent creditors can enforce this liability, when otherwise entitled to do so, though the corporation is in bankruptcy and a trustee is appointed, for the liability of the stockholder is not a corporate asset which the trustee takes from the bankrupt, nor is it a liability which he may assert as a representative of creditors.

Action in the district court for Hennepin county. The facts are stated in the opinion. Cyril L. Clark demurred to the complaint on the grounds that the facts stated in the complaint did not constitute a cause of action, that plaintiff had not legal capacity to sue, and that there was a defect of parties defendant in that the trustee in bankruptcy of defendant corporation was not made a party to the action. The demurrer was sustained, Rockwood, J. From the order sustaining the demurrer. plaintiff appealed. Reversed.

*Allen & Fletcher, James D. Shearer and L. B. Byard*, for appellant.

*Brady, Robertson & Bonner*, for respondent.

<sup>1</sup>Reported in 173 N. W. 560.

DIBELL, J.

Action by the plaintiff bank, a creditor suing in its own behalf and in behalf of all the creditors of the Kenney Band Instrument Company, a corporation in bankruptcy, to recover the difference between what they paid for their stock and its par value. There was a demurrer by the defendant Clark. The demurrer was sustained and the plaintiff appeals.

1. In substance the complaint alleges that \$100,000 in stock of the Kenney Company was issued in payment of assets worth not more than \$7,500. To the extent indicated the stock was bonus stock. The debt of the plaintiff arose subsequently to the issue of the stock to the defendant. The corporate assets are insufficient to pay the debts.

Where issued stock is bonus stock, or where it is partly bonus because issued as fully paid when only a part is or is to be paid, or when issued as fully paid upon a grossly inadequate consideration in property transferred, stockholders receiving it will be required to pay the difference between what they paid and par if subsequent creditors who have actually or presumably relied upon the stock as fully paid require it for the satisfaction of their debts. This is the settled doctrine of this state. The liability is founded on fraud, and the doctrine is extended to include substantially any diversion to stockholders of capital stock when it operates as a fraud upon subsequent creditors. *Hospes v. N. W. Mnfg. & Car Co.* 48 Minn. 174, 50 N. W. 1117, 15 L.R.A. 470, 31 Am. St. 637; *N. W. Railroader v. Prior*, 68 Minn. 95, 70 N. W. 869; *Hastings Malting Co. v. Iron Range Brewing Co.* 65 Minn. 28, 67 N. W. 652; *Wallace v. Carpenter Elec. H. Mnfg. Co.* 70 Minn. 321, 73 N. W. 189, 68 Am. St. 530; *Downer v. Union Land Co.* 113 Minn. 410, 129 N. W. 777; *First Nat. Bank of Deadwood v. Gustin M. C. M. Co.* 42 Minn. 327, 44 N. W. 198, 6 L.R.A. 676, 18 Am. St. 510; *Minnesota T. M. Co. v. Langdon*, 44 Minn. 37, 46 N. W. 310; *Preiss v. Zins*, 122 Minn. 441, 142 N. W. 822; *Randall Printing Co. v. Sanitas M. W. Co.* 120 Minn. 268, 139 N. W. 606, 43 L.R.A. (N.S.) 706; *Mackall v. Pocock*, 136 Minn. 8, 161 N. W. 228, L.R.A. 1917C, 390.

2. The question important here is whether subsequent creditors can enforce the liability stated against a stockholder when the corporation is in bankruptcy. The plaintiff claims that the trustee in bankruptcy can-

not sue and therefore the creditors can. The defendant claims that the right is in the trustee alone.

It has been held that the trustee in bankruptcy cannot maintain an action to enforce the liability. *Courtney v. Croxton*, 152 C. C. A. 235, 239 Fed. 247; *Courtney v. Georger*, 143 C. C. A. 257, 228 Fed. 859, affirming *Courtney v. Georger*, 221 Fed. 502; *In re Jassey Co.* 101 C. C. A. 641, 178 Fed. 515; *In re Huffman-Salvar Roofing Paint Co.* 234 Fed. 798. The case first cited was decided by the circuit court of appeals of the Sixth circuit and the second and third ones by the circuit court of appeals of the Second circuit. A petition for review by certiorari of the second case was denied by the Supreme Court. 241 U. S. 660, 36 Sup. Ct. 448, 60 L. ed. 1226. The first and second cases involved a Minnesota corporation.

The Federal courts, in determining the character of the liability of the stockholders of a Minnesota corporation taking bonus stock, follow the construction of the highest court of Minnesota and make the character of the liability a question of local law. The question whether liability of such a character can be enforced by the trustee in bankruptcy is a Federal one. It is a question of what rights he takes under the bankrupt act.

If what it is sought to recover were an unpaid stock subscription no question could be made but that the trustee in bankruptcy could recover. The corporation if not in bankruptcy could. Its trustee could. The corporation cannot recover for bonus stock. See *Hoffman M. T. Co. v. Erickson*, 124 Minn. 279, 144 N. W. 952; *Randall Printing Co. v. Sanitas M. W. Co.* 120 Minn. 268, 139 N. W. 606, 43 L.R.A. (N.S.) 706, and cases cited in a preceding paragraph. A creditor, as we have seen, can, and a stockholder may protect his interests. *Shaw v. Staight*, 107 Minn. 152, 119 N. W. 951, 20 L.R.A. (N.S.) 1077, and cases cited.

In *Minneapolis Baseball Co. v. City Bank*, 66 Minn. 441, 69 N. W. 331, it was held that a receiver in sequestration proceedings could not recover of stockholders on their constitutional double liability, though in *Minnesota T. M. Co. v. Langdon*, 44 Minn. 37, 46 N. W. 310, it was held that a receiver could recover capital withdrawn and refunded to the stockholders as a gratuity. The subsequent legislation of 1897 and 1899 put a right of recovery in an assignee or receiver. See G. S. 1913, §

6645, et seq.; *Way v. Barney*, 116 Minn. 285, 133 N. W. 801, 38 L.R.A. (N.S.) 648, Ann. Cas. 1913A, 719; *Somers v. Dawson*, 86 Minn. 42, 90 N. W. 119. The Supreme Court of the United States has recognized the right of a receiver or assignee under our statute to recover on the constitutional liability. *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. ed. 1163; *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. ed. 749, Ann. Cas. 1913D, 1292. But it holds that bankruptcy proceedings do not prevent a recovery on the constitutional liability in a proceeding by the creditors in a state court. *Selig v. Hamilton*, 234 U. S. 652, 34 Sup. Ct. 926, 58 L. ed. 1518, Ann. Cas. 1917A, 104. The holding is put substantially upon the ground that the liability is not a corporate asset, nor a liability on contract, nor a liability to the corporation, with which the trustee has to do, but a right created for the creditors and personal to them. A distinction may be drawn between the constitutional double liability and the liability on bonus stock, but the fact that a receiver appointed in Minnesota may recover on the double liability does not induce the Supreme Court of the United States to hold that the trustee in bankruptcy may. And in *Seegmiller v. Day*, 161 C. C. A. 213, 249 Fed. 177, decided by the circuit court of appeals of the Seventh circuit, it is held that the trustee can recover of stockholders dividends illegally paid from capital, but cannot recover upon a liability created by statute in favor of creditors and against directors assenting to the payment. To the same effect is *In re Beachy & Co.* (D. C.) 170 Fed. 825. And see *Edwards v. Schillinger* (1910) 245 Ill. 231, 91 N. E. 1048, 33 L.R.A. (N.S.) 895, 137 Am. St. 308.

The Federal cases noted hold in effect that the constitutional liability and the liability of the owner of bonus stock are for the creditors and in no sense constitute a corporate asset, and that the trustee cannot assert the liability as a successor to the property of the bankrupt nor as a representative of his creditors.

The following are cited for the defendant: *Falco v. Kaupisch Creamery Co.* 42 Ore. 422, 70 Pac. 286; *Bernard v. Carr*, 167 N. C. 481, 83 S. E. 816; *Babbitt v. Read*, 215 Fed. 395; *In re Remington, etc., Co.* 153 Fed. 345, 82 C. C. A. 421; *DeMuth v. Faw*, 103 Wash. 279, 174 Pac. 18; *Grand Rapids Trust Co. v. Nichols*, 199 Mich. 126, 165 N. W. 667. In all of these, and in some others cited, it was held that the trustee could



maintain an action, but an examination discloses that in all, except in the Michigan case, the liability was a corporate asset, or at least it was a liability distinguishably different from that which we are considering. The Michigan case relies largely upon section 47 of the bankrupt act, as amended June 25, 1910, giving the trustee the rights, powers and remedies of a judgment creditor. The other cases, those for and those against the right of the trustee, in effect let the solution of the question depend upon whether the liability is or is not a corporate asset or a right represented by the trustee.

The Michigan case has much in practical convenience to commend it. It fits in well with *Bergin v. Blackwood*, 141 Minn. 325, 170 N. W. 508. A holding which would permit the bankruptcy court in its administration of the bankrupt estate to enforce through its trustee the liability of holders of bonus stock, or to decline to do so and leave it to the state courts, as the convenience of the particular estate suggests, or which would permit the state court to proceed upon the refusal or failure of the trustee or the bankruptcy court to take action, would be workable. This would leave the right of administration in the bankruptcy court with the right in the creditors to prosecute the stock liability if the trustee did not. It might be well if the trustee had the requisite authority and the question were made one of convenient practice. But the holdings are not so. In *Mackall v. Pocock*, 136 Minn. 8, 161 N. W. 228, L.R.A. 1917C, 390, the trustee maintained an action, but it was for dividends paid to stockholders out of capital. They were corporate assets. And in *Way v. Barney*, 116 Minn. 285, 133 N. W. 801, 38 L.R.A.(N.S.) 648, Ann. Cas. 1913A, 719, creditors without objection enforced the double liability of stockholders of a corporation in bankruptcy. Neither case is authority on the question of the power of the trustee.

If the trustee in bankruptcy is without power under the bankrupt act to enforce the liability of the holder of bonus stock the creditors have the right. Following the decisions of the Federal courts in the cases noted we hold that the trustee being without authority to maintain an action the creditors may maintain it as if bankruptcy had not intervened.

Order reversed.

C. J. McRAE v. THOMAS M. FEIGH AND ANOTHER.

J. D. MAHONEY, AS SPECIAL ADMINISTRATOR,  
APPELLANT.<sup>1</sup>

July 11, 1919.

No. 21,286.

**APPEAL OF DEFENDANT MAHONEY.**

**Broker — findings supported by evidence.**

1. The findings of the trial court that the owners of a tract of land, containing deposits of iron ore, employed plaintiff to procure a purchaser who would take an option for a lease on certain prescribed terms, and promised plaintiff as compensation whatever amount he obtained as a royalty over 25 cents per ton; that plaintiff procured a purchaser ready to take an option for a lease at a royalty of 30 cents per ton; that the owners refused to execute this contract solely for the reason that plaintiff claimed the excess royalty of five cents per ton; that thereafter the owners made a new agreement with plaintiff, by which, in case the property was leased, plaintiff was to have any excess of royalty over 30 cents per ton, and was to have this excess even if the property was leased by the owners without plaintiff's aid, is sustained by the evidence.

**Variance.**

2. There was not sufficient difference between the contract proved and the contract alleged to constitute a fatal variance.

**Limitation of action — laches.**

3. The cause of action was not barred by the statute of limitations, nor by the laches of defendant.

**Statute of frauds.**

4. Enforcement of the contract is not inhibited by the statute of frauds, as it was performable within one year and was actually consummated within that period.

**Contract — consideration — uncertainty.**

5. The relinquishment of plaintiff's claim under the prior contract and his acts under the present contract constitute a valid consideration, and the contract is not void for want of mutuality. Neither is it void for indefiniteness and uncertainty.

<sup>1</sup>Reported in 173 N. W. 655.

## APPEAL OF PLAINTIFF.

**Receiver — appointment not warranted.**

Plaintiff sought the appointment of a receiver to collect and pay to him his share of the royalties which should accrue in the future, and appealed from an order denying a new trial of this issue. *Held* that the facts shown did not entitle plaintiff to such relief.

Action in the district court for St. Louis county against Thomas M. Feigh and Patrick Hammel, copartners doing business under the name of Thomas Feigh, to recover \$41,438.29 and to have a receiver appointed to collect future royalties over and above 30 cents per ton upon all ore removed from the premises described in the complaint. Upon the death of Thomas Feigh, J. Daniel Mahoney, special administrator of his estate, was substituted defendant. The facts are stated in the opinion. The case was tried before Fesler, J., who at the close of the testimony denied defendants' motion for a directed verdict, submitted to the jury the three questions mentioned in the opinion on page 244, and ordered judgment in favor of plaintiff for the amount demanded. Plaintiff's motion for amended findings or for a new trial was denied. From an order denying defendant Feigh's motion to amend the findings and order judgment for defendant notwithstanding the verdict or for a new trial, J. Daniel Mahoney, as special administrator of the estate of Thomas Feigh, deceased, appealed. From an order denying his motion for a new trial, plaintiff appealed. Affirmed on both appeals.

*Fryberger, Fulton & Spear* and *A. T. Rock*, for plaintiff.

*A. L. Agatin* and *Albert Fink*, for the special administrator.

**TAYLOR, C.**

In 1905, defendant Feigh became the owner of a tract of land in Crow Wing county on which an iron mine was subsequently developed. The land was purchased through defendant Hammel, and a claim made by Hammel to an interest in the property was determined in his favor in the case of *Hammel v. Feigh*, *supra*, page 115, 173 N. W. 570, in which the decision of this court was filed on June 20, 1919.

After it became known that the land contained deposits of iron ore, Feigh desired to find a purchaser for the ore who would take a lease of

the property and mine the ore on a royalty basis. It appears from the findings of fact that in 1907 Feigh promised to pay plaintiff \$500 if plaintiff procured a purchaser who took an option for such a lease at a royalty of 25 cents per ton on certain prescribed conditions, and \$5,000 if such purchaser exercised the option and actually took a lease; that under this agreement plaintiff opened negotiations with the representative of an iron company, but did not succeed in closing a contract, and later opened negotiations with another iron company which were progressing favorably, but were terminated because Feigh gave an option for a lease to another party; that thereafter plaintiff made a new agreement with Feigh, by which instead of a cash commission he was to have whatever amount he secured as a royalty over and above 25 cents per ton; that acting under this agreement he induced E. C. Hollidge to agree to take an option for a lease at 30 cents per ton; that after the contract had been drawn up and had been approved as to form by the attorneys of both parties, Feigh refused to sign it because he was unwilling to allow plaintiff five cents per ton of the royalty; that thereafter and on or about July 1, 1909, plaintiff made another agreement with Feigh by which he was given the exclusive right to lease the property and by which "said defendants agreed to give plaintiff all they got over and above thirty cents a ton in case plaintiff secured a lessee and that if defendants themselves leased the property without the aid of plaintiff they would give plaintiff everything they got over thirty cents a ton;" that acting under this agreement plaintiff again tried to find a party who would take an option for a lease; that on August 24, 1909, Feigh made a contract with the C. M. Hill Lumber Company, by which that company took an option for a lease at a royalty of 35 cents per ton payable quarterly on the twentieth day of each January, April, July and October while the lease remained in force; that after doing some exploratory work this company exercised its option, and on May 24, 1910, took the lease of the property under and in accordance with the contract; that the mine has been developed and is still being operated under this lease as changed and modified by the parties; that Feigh has been paid 35 cents per ton for all ore taken from the property; that he received the first of these payments on July 20, 1910, and has received

a payment on every succeeding quarter day, and that he refused to pay to plaintiff any part of the amount so received.

On October 1, 1917, plaintiff commenced this action to recover one-seventh of each payment already received by Feigh under the lease, and to have a receiver appointed to collect the future royalties, or for such other equitable relief as would secure the payment to plaintiff of his share of such future royalties as they accrued.

Feigh interposed a separate answer, in which he admitted leasing the property to the C. M. Hill Lumber Company and the payment of royalties by that company as claimed by plaintiff, admitted that in 1908 he had agreed to pay plaintiff \$5,000, if plaintiff effected a lease of the property at 30 cents per ton, admitted that he refused to sign the Hollidge lease because plaintiff claimed all of the royalty above 25 cents per ton, and denied the other claims of plaintiff.

Defendant Hammel interposed a separate answer in which he asserted ownership of a half interest in the mine, and admitted that Feigh, acting for both of them, had made the contract with plaintiff as alleged by plaintiff, and that plaintiff was entitled to five cents per ton of the royalty received under the lease made by Feigh.

The action was tried as an action in equity, but the court submitted the following three questions to a jury:

(1) Did the defendants agree with plaintiff to give plaintiff an exclusive option to lease the property?

(2) Did the defendants agree with plaintiff to give plaintiff all they got over and above thirty cents a ton in case the plaintiff secured a lessee?

(3) Did the defendants agree with the plaintiff that if defendants themselves leased the property without the aid of plaintiff they would give plaintiff everything they got over and above thirty cents a ton?

To each of these questions the jury answered "yes." The court made full findings of fact which accord with the findings of the jury and directed judgment in favor of plaintiff for plaintiff's share of the royalties already received by Feigh, but made no provision for securing plaintiff's share of royalties which may be paid in the future. Feigh moved to set aside the verdict, and to amend the findings and for a

judgment in his favor, or for a new trial. While these motions were pending Feigh died and Daniel Mahoney, as special administrator of his estate, was substituted as defendant in his place and stead. These motions were denied and the special administrator appealed.

### APPEAL OF DEFENDANT MAHONEY.

1. The court found as a fact that plaintiff was not the procuring cause of the lease made by Feigh with the C. M. Hill Lumber Company, and hence plaintiff's claim to the amount by which the royalty exceeded 30 cents per ton rests upon the agreement found both by the jury and by the court that plaintiff should receive such excess even if the lease was made by Feigh himself without plaintiff's assistance. Appellant attacks this finding as unsupported by the evidence. Plaintiff and Hammel testified to the effect that such was the agreement. Feigh denied it. Appellant urges various considerations as discrediting the testimony of plaintiff and Hammel, and justifying its rejection. The extent to which a witness is to be believed and the weight to be given to his testimony are for the jury and the trial court to determine. If they had found that no such agreement had been made, the arguments advanced by appellant and the authorities cited by him would be in point to sustain such finding. But both the jury and the trial court found that such an agreement had, in fact, been made, and, as the evidence on the part of plaintiff, if believed, is sufficient to justify this finding, the finding must stand.

2. Appellant contends that there is a fatal variance between the allegations of the complaint and the proof. This contention seems to be based mainly on the fact that plaintiff failed to prove the allegation that he was the procuring cause of the lease to the Hill Company and the claim that the allegations of the complaint are not broad enough to permit plaintiff to prove an agreement to give him all of the royalty above 30 cents per ton in case defendants leased the property without his assistance. The complaint alleges:

"That thereupon said defendants agreed with this plaintiff that in view of what he had already done upon said property and in consideration of the same, that they would give this plaintiff the exclusive right

to secure a party willing to take an option for a lease upon said property \* \* \* that if said lease should be taken that plaintiff should receive from defendants for his said services, whatever he would get for them over and above a royalty of 30 cents per ton \* \* \* that defendants themselves should not interfere with plaintiff's leasing said property by themselves giving option to other parties, as had occurred before, and that if said defendants should themselves option said property during the refusal given to this plaintiff, that the same should not affect the right of this plaintiff to his said compensations, but that he should, in like manner, receive as pay for his services said excess above said royalty of 30 cents per ton upon the ore to be removed from said property."

Under our statutes pleadings are construed liberally, and a variance is not fatal unless the pleading alleged a cause of action different from that proven, or actually misled the adverse party. 2 Dunnell, Minn. Dig. §§ 7672, 7673, 7674. There was no such variance between the contract alleged and the contract proved as to mislead the defendants.

3. The court found that "plaintiff is not guilty of laches in the bringing of this action." Appellant attacks this finding as not justified by the evidence. The first royalty was paid July 20, 1910. Feigh removed from the state of Minnesota to Chicago, Illinois, in April, 1916, and consequently no part of plaintiff's claim is barred by the statute of limitations. G. S. 1913, § 7708. At the time plaintiff brought this action he could have maintained a suit at law on the contract to recover his share of each of the payments theretofore received by Feigh. A court of equity will not bar a claim, enforceable in an action at law, for a delay of less than the statutory period, at least, unless it be shown that the enforcement of the claim will result in substantial injury to innocent parties. See 2 Dunnell, Minn. Dig. § 5351.

4. Appellant contends that plaintiff's contract was not to be performed within one year and is within the statute of frauds and unenforceable for that reason. The statute provides that no action shall be maintained on an agreement resting in parole "that by its terms is not to be performed within one year from the making thereof." G. S. 1913, § 6998.

In *Langan v. Iverson*, 78 Minn. 299, 80 N. W. 1051, it is stated:

"That statute applies only to contracts which are not to be performed upon either side within a year. If all that is to be performed on one side is to be performed within a year, the contract is not within the statute."

In *Stitt v. Rat Portage Lumber Co.* 98 Minn. 52, 107 N. W. 824, it is stated: "The statute of frauds has no application where the contract could be performed within the year, nor where it runs for an indefinite time."

In *Taylor v. Times Newspaper Co.* 83 Minn. 523, 86 N. W. 760, 85 Am. St. 473, it is stated: "Contracts held void under the first subdivision of G. S. 1894, § 4209 [G. S. 1913, § 6998], are such only as cannot, by their terms, be performed within a year."

In *Kruse v. Tripp*, 129 Minn. 252, 259, 152 N. W. 538, which involved some elements similar to some of those in the instant case, it is stated:

"The agreement was entered into on May 26, and, though not in writing, the final act in consummation of the relation was the royalty contract with the Pine Tree Co., and that was entered into in the month of October following. It was fully performed within a year by plaintiff, through the conveyance of the land to the railway company, and defendant is in no position to invoke the statute, if it can be said to be applicable at all."

The contract here in question fixed no definite time within which it was to be performed. It contained no provision postponing performance beyond a year and cannot be construed as contemplating any such postponement. It could be fully performed within a year. The royalty contract with the lumber company was made within the year. The act of the defendants in making this contract relieved plaintiff from all duty of further performance under his contract, as nothing remained for him to do. Plaintiff's contract was fully consummated within the year and is not within the statute.

5. Appellant contends that the contract is unilateral and without consideration, also that it is too indefinite and uncertain to be enforced. As the findings are in favor of plaintiff, in considering the questions presented we must take the view of the evidence most favorable to plaintiff.

Under his original contract plaintiff interested an iron company in



the property to such an extent that they expressed a willingness to take an option for a lease. When he reported this proposition to Feigh, he was informed that a contract could not be made at that time, as an option given by Feigh to a third party was still outstanding. Feigh suggested that he drag the negotiations along until this option terminated. He refused to do so and informed the iron company of the outstanding option, whereupon they abandoned the negotiations. Under the new agreement made after the option given by Feigh had expired, plaintiff induced Hollidge to take an option for a lease at a royalty of 30 cents per ton. All the terms of both option and lease were agreed upon and were embodied in an elaborate written instrument covering 14 printed pages of the record, drawn by the attorney for Hollidge and approved by the attorney for Feigh. After this contract had been prepared ready for execution, Feigh refused to sign it, solely for the reason that plaintiff claimed five cents per ton of the royalty. After this deal fell through because of Feigh's refusal to complete it and after more or less controversy between plaintiff and Feigh, they made the agreement now in dispute. The prior transactions between them were taken into consideration by both parties in making this agreement. It superseded the prior agreements, and operated as a relinquishment on plaintiff's part of any claim for damages growing out of Feigh's failure to carry out such prior agreements. Under this last agreement, plaintiff suggested to two different parties interested in the iron business the matter of taking an option for a lease, but did not succeed in interesting them in the project. He had a talk at Deerwood with a mining engineer connected with the C. M. Hill Lumber Company concerning a lease to that company, and returned to Duluth the next day, where he learned that that company had already made a contract directly with Feigh. The foregoing facts show a sufficient consideration for plaintiff's contract and it is not void for want of mutuality. *Lapham v. Flint*, 86 Minn. 376, 90 N. W. 780.

Appellant insists that "the contract is too indefinite and uncertain to be capable of enforcement." The indefiniteness and uncertainty which appellant urges as voiding the contract are not as to the terms of the contract between plaintiff and Feigh, but as to the terms to be embodied in the contract between Feigh and the lessee if a lessee were ob-

tained. The taking of options for leases, with an obligation to explore for ore while holding the option, has been common on the iron ranges for many years, and the general nature and customary provisions of such contracts are well known to those engaged in that sort of business. The several agreements between plaintiff and Feigh specified the rate per ton which any lessee procured by plaintiff would be required to pay Feigh as a royalty, and specified for each year the minimum quantity of ore on which he would be required to pay the royalty, even if he mined a less quantity or none at all in such year. As was common in such transactions, other terms and details, not specifically stated and usually not the subject of much controversy where the parties came to an agreement in respect to the royalties and the minimums, were left to be settled and agreed upon at the time of drawing the formal contract. There has been no controversy at any time over these terms. No question was raised concerning them when plaintiff interested an iron company in the property under his first agreement. They were specified fully and in detail in the proposed Hollidge contract, and, as embodied therein, were agreed to by both parties without dispute. Except as to the amount of royalty and the amount of minimums, the same terms contained in the Hollidge contract were incorporated in substance in the contract with the C. M. Hill Lumber Company under which the mine is now being operated. So far as any uncertainty existed as to the terms, it was cured and the terms were made certain when the formal contract was executed. The lease having been actually effected on terms satisfactory to Feigh, he is not in position to complain that some of these terms were not expressly specified in his agreement with plaintiff at the time it was first made. *Hubachek v. Hazzard*, 83 Minn. 437, 86 N. W. 426.

We find no other questions raised by the appeal of the administrator which require special mention and the order denying Feigh's motion for a new trial is affirmed.

#### APPEAL OF PLAINTIFF.

The court declined to appoint a receiver or make other provision for the collection of plaintiff's share of the future royalties, but on plain-

tiff's motion amended its findings by setting forth therein the material facts on which plaintiff bases his claim for such equitable relief. Plaintiff made a motion for a new trial of this issue and appealed from the order denying his motion.

Plaintiff's claim that the court should appoint a receiver or make some other provision for the collection and payment of his share of the future royalties, is based on the assumption that defendants and their successors in interest will refuse to make these payments as they become due, and that plaintiff will be compelled to resort to the courts in order to collect them. He calls attention to the fact that these payments may extend over a period of 40 years; that Feigh had died and left numerous heirs scattered through several states and the Dominion of Canada; that Hammel is well along in years and his interest may pass to nonresidents, and argues that bringing suit against all these parties for the several payments as they accrue, if not impracticable, will be so burdensome that the court under its equitable powers ought to provide for the payment of his share of the royalty directly to him or to a receiver for him.

The controversy, heretofore, has been as to whether plaintiff is entitled to the excess royalty of five cents per ton. Feigh asserted that it did not belong to plaintiff and refused to give it to him for that reason. This controversy is now settled and plaintiff's right to the excess established. The previous refusals to make payment were based on a denial of the obligation. Now that the obligation is established, we cannot assume that defendants or their successors in interest will refuse to perform it henceforth. If they do, the mine is within the jurisdiction of the court, and their interest therein can be subjected to the payment of plaintiff's claims, and the court can take such action as may be necessary for the adequate protection and enforcement of plaintiff's rights. But we concur in the conclusion of the trial court that no sufficient reason is yet shown for the court, in effect, to take charge of the collection and distribution of the future royalties.

The order appealed from by plaintiff as well as the order appealed from by the special administrator of the estate of Thomas Feigh is affirmed.

CARL R. WILDUNG v. SECURITY MORTGAGE COMPANY OF  
AMERICA.

D. V. HINRICHS AND ANOTHER, APPELLANTS.<sup>1</sup>

July 11, 1919.

No. 21,288.

**Attorney and client — settlement of litigation.**

1. Parties to an action have a right to settle it in any manner they see fit without the knowledge or consent of their attorneys.

**Same — lien of attorney — notice to litigants.**

2. In making a settlement, they are required to take notice of the lien rights which are given by statute to attorneys, and, for their own protection, are bound to guard against a possible second liability under the lien, precisely as they would be if the transaction involved mortgaged property.

**Trover and conversion — statute inapplicable.**

3. Subdivision 3 of section 1, chapter 98, Laws 1917, relating to notice, has no application to an action for damages for the alleged conversion of plaintiff's property.

**Lien of attorney — right of set-off superior.**

4. An attorney's lien attaches only to the amount which is ultimately due his client after adjusting all the cross-demands and equities between the parties to the action. It extends to the clear balance found to be due the client either at the termination of the litigation or in the settlement, if one is made. The right of set-off between the parties to an action is superior to the claims of attorneys under the lien statute.

**Objection to counterclaim — waiver.**

5. The objection that counterclaims are not proper under G. S. 1913, § 7757, is waived if a settlement is made and the parties treat the demands upon which the counterclaims were founded as valid.

**Amount of lien fixed by express contract.**

6. Where there was an express contract between an attorney and his client, fixing the compensation which the former was to receive, the amount of his lien for services is properly determined by referring to the contract.

<sup>1</sup>Reported in 173 N. W. 429.

Action in the district court for Ramsey county to recover \$12,200 for conversion of an automobile and certain books and papers. The facts are stated in the opinion. The motion of Charles E. Bowen, attorney of the plaintiff, to vacate the stipulation for settlement and dismissal filed in the cause, to determine and award to him the fees to which he was entitled for services rendered in the action, was heard by Olin B. Lewis, J., who made findings and awarded plaintiff \$1,119.18 as compensation for his services, and the amount of his disbursements, and gave him a lien for the same. From the findings and order for judgment, defendants appealed. Modified.

*Todd, Fosnes, Sterling & Nelson*, for appellants.

*Charles E. Bowen*, pro se.

LEES, C.

Plaintiff, a dealer in automobiles, brought this action to recover damages for conversion of an automobile and certain books and papers. The value of the property was alleged to be \$1,200. He also sought to recover \$5,000 special damages for mental anguish caused by the malicious conduct of defendants in taking the property, and \$3,000 for destroying his trade and business. The mortgage company and Hinrichs answered jointly and alleged that they held three notes on which plaintiff was liable as maker or guarantor, amounting to \$1,562.74. The notes were severally pleaded as counterclaims. Hagen answered separately and set up a counterclaim of \$400 for services rendered to plaintiff. Plaintiff demurred to each of the counterclaims, and on September 9, 1918, noticed the demurrers for argument on September 21. On September 10 a settlement was made, whereby the parties mutually released and discharged each other from all claims and demands, and stipulated that the action then pending should be dismissed. Garnishment proceedings, which had been instituted, were also dismissed and the garnishee discharged.

Charles E. Bowen was plaintiff's attorney in the action. He had a written contract with plaintiff whereby it was agreed that he should receive as compensation for his services "45 per cent of the amount recovered in the adjustment of (plaintiff's) claim by suit or otherwise." The summons was served on August 6 and filed on August 11, 1918.

The settlement was made without the knowledge or consent of plaintiff's attorney. He has never been paid anything for his services or disbursements. Defendants made the settlement with notice of his statutory lien on the cause of action and with intent to deprive him of compensation.

In the settlement, plaintiff got from the mortgage company the three notes upon which its counterclaims were founded and a check for \$471.-52. He also got a release from Hagen of the latter's claim for services. The total amount thus received was \$2,489.31. The court found that all the counterclaims were valid and that plaintiff was legally bound to pay them.

On September 20, 1918, an order was entered requiring defendants to show cause why the settlement agreement should not be set aside, the amount to which plaintiff's attorney was entitled as compensation for his services determined, and judgment rendered for the amount so determined, pursuant to the statute relating to attorney's liens. The matter was submitted on the files in the case and affidavits of the parties and their attorneys. The court awarded plaintiff's attorney \$1,119.18 as compensation for his services under his contract of employment, and \$10.95 to reimburse him for the expenses of bringing suit, and he was given judgment against defendants accordingly. They appeal from the judgment.

The attorney's lien statute has been frequently before this court for construction and application. The original statute was amended by chapter 98, p. 121, Laws 1917. So far as here material, the statute now provides that an attorney has a lien for his compensation upon the cause of action from the time of the service of the summons, that such lien may be established and the amount thereof determined by the court summarily in the action on the application of the lien claimant, and that judgment shall be entered under the direction of the court, adjudging the amount due and the sale of the property subjected to the lien to satisfy such amount.

1. The parties had a right to settle the action as they saw fit, without the knowledge or consent of their attorneys. *Boogren v. St. Paul City Ry. Co.* 97 Minn. 51, 106 N. W. 104, 3 L.R.A.(N.S.) 379, 114 Am. St. 691; *Burho v. Carmichiel*, 117 Minn. 211, 135 N. W. 386, Ann

Cas. 1913D, 305; Southworth v. Rosendahl, 133 Minn. 447, 158 N. W. 717.

2. In making a settlement, they were required to take notice of the lien rights which are given by the statute to attorneys, and for their own protection were bound to guard against a possible second liability under the lien, as they would be if the transaction involved mortgaged property. Kubu v. Kabes, 142 Minn. 443, 172 N. W. 496; Desaman v. Butler Bros. 114 Minn. 362, 131 N. W. 463.

3. The provision for notice contained in chapter 98, p. 121, Laws 1917, has no application in a case such as this, where the cause of action grows out of the alleged conversion of plaintiff's property, and the action is brought to recover damages only.

4. The principal question raised may be thus stated: Does an attorney's lien attach to the full amount of the original claim of his client, or only to the amount which is ultimately found to be due him after adjusting all the cross-demands and equities between the parties to the action? In Morton v. Urquhart, 79 Minn. 390, 82 N. W. 653, it was held, that a judgment debtor might set off against his judgment creditor a judgment against him which he had purchased from a third party and so defeat a lien of the attorney for the judgment creditor upon the judgment in favor of his client. It was remarked that the right of set-off between parties to an action is superior to the claim of an attorney who can have no greater rights against a judgment debtor than his client has.

Under this rule, if plaintiff had recovered a judgment against the mortgage company and it had obtained a judgment against him in an independent action brought on his notes, it could have set off such judgment against his, and thus defeat the lien of his attorney. If his rights in the case supposed would have been subordinate to such right of set-off, they must also be subordinate to the right of each defendant to set off the original demand on which the judgment would be founded if recovered in an independent action brought thereon. In principle, it is immaterial whether a defendant resorts to an independent action to recover upon a demand he has against plaintiff or asserts such demand by way of counterclaim. It follows that by canceling a portion of plaintiff's claim for unliquidated damages by the surrender of the notes and

discharge of the account, which were the basis of the several counterclaims against him, the parties were accomplishing only that which the court might have compelled had several independent actions been brought, resulting in judgments against plaintiff. In either event the attorney's lien rights are affected in the same way.

The weight of authority sustains the conclusion we have reached. It is generally held that an attorney's lien should extend only to the clear balance found to be due his client either at the termination of the litigation or in the settlement, if one is made. *Nat. Bank of Winterset v. Eyre*, 8 Fed. 733; *Bosworth v. Tallman*, 66 Wis. 533, 29 N. W. 542; *Tiffany v. Stewart*, 60 Iowa, 207, 14 N. W. 241; *Mosley v. Norman*, 74 Ala. 422; *Popplewell v. Hill*, 55 Ark. 622, 18 S. W. 1054. The rule has been happily stated as follows: "Natural equity says that cross-demands should compensate each other by deducting the less sum from the greater, and that the difference is the only sum which can be justly due." *Story, Eq. Jur.* § 1868.

5. It is contended that the notes and accounts were not proper subjects of counterclaim because they do not come within any of the provisions of G. S. 1913, § 7757. This may be conceded without defeating the application of the principles to which reference has been made. Plaintiff had the undoubted right to make the settlement which was agreed upon and is not questioning it so far as his own rights were affected by it. In effect he withdrew his demurrers when he made the settlement. Furthermore by holding, as we do, that the lien of an attorney extends only to the clear balance due his client upon the settlement of the cross-demands of the parties, we nullify the effect of the argument against the counterclaims, even though it be recognized as a correct statement of the law in the abstract.

6. It was suggested, but not decided, in *Desaman v. Butler Bros.* 118 Minn. 198, 136 N. W. 747, Ann. Cas. 1913E, 642, that, if a settlement is made at any time before the rendition of a verdict, the attorney's lien for services is measured by the amount actually received, and in *Davis v. Great Northern Ry. Co.* 128 Minn. 354, 359, 151 N. W. 128, 130, it was held that ordinarily the amount received in the settlement must be taken as the basis on which to compute attorney's fees. In the case at bar, there was no proof as to the value of the attorney's services.



The court adopted the contract of employment as the measure of their value. No question has been raised on this appeal as to the propriety of so doing. On that basis the judgment should have been for the agreed percentage of the money which was actually received in the settlement and for the disbursements incurred in bringing the action. The amount so received was represented by the check of \$471.52. This sum only was subject to the attorney's lien.

A new trial is unnecessary in view of the full and specific findings which were made. The judgment should be modified and the case is remanded with directions to amend the findings of fact and conclusions of law so as to provide that plaintiff's attorney shall have a lien of \$223.13 upon the cause of action herein, with interest thereon from September 14, 1918, and for judgment against defendants for that amount with costs.

Judgment modified.

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WILLIAM GARRETT v. H. P. SKORSTAD AND OTHERS.  
COUNTY BOARD OF CLAY COUNTY, APPELLANT.<sup>1</sup>

July 11, 1919.

No. 21,291.

**Drain — order of county board res adjudicata — construction of culvert for surface water.**

When a county ditch is regularly established by order of the county board and the assessment for benefits and damages is made and the ditch is constructed, the order is res adjudicata and the ditch proceeding is not subject to collateral attack; and when the ditch runs along a highway and the earth from the ditch is wasted upon the highway, as is authorized by the statute, and a turnpike is made, and thereby a swale or coulee across the highway is dammed so that the surface waters, in time of high water, do not take their natural course across the highway, a landowner is not entitled to obtain in an independent action culverts or openings through the highway or turnpike so that the flow of surface waters shall not be obstructed.

<sup>1</sup>Reported in 178 N. W. 406.

Action in the district court for Clay county to restrain defendants from constructing a proposed embankment across a natural watercourse known as the Chris Lowe coulee; that they be required to remove all embankments theretofore constructed in the watercourse and to open the highway to permit free passage of waters flowing in it. The facts are stated in the opinion. The case was tried before Johnson, J., judge of the First judicial district, sitting for the judges of the Seventh judicial district, who made findings and granted a permanent injunction. From an order denying its motion for amended findings or for a new trial, Clay county appealed. Reversed.

*Garfield H. Rustad*, County Attorney, and *Christian G. Dosland*, Special Attorney for Drainage District, for appellant.

*Charles S. Marden* and *Douglas, Kennedy & Kennedy*, for respondent.

DIBELL, J.

Action to enjoin the defendants H. B. Skorstad and others, individually and as members of the town board of the town of Georgetown in Clay county, and the county board of Clay county, from obstructing a swale or coulee, which crosses the plaintiff's land, by maintaining an embankment along a county ditch which intersects the coulee at right angles. There were findings for the plaintiff awarding an injunction and the defendant county board appeals. The other defendants do not appeal and their interests are not involved.

The town of Georgetown is Congressional township 142, range 48. The plaintiff owns the west half of section 26. His land is four miles east of the Red River of the North. In 1907 and 1908 the county board constructed ditch No. 6 along the north line of his land and wasted the earth to the north on the highway along the section line. This ditch is 9 miles long. Ditch No. 7, established at the same time, is 11 miles long, and connects with No. 6. Physically they are one ditch 20 miles long extending directly east from the Red river on a section line. Two miles north is ditch No. 14, parallel with No. 6, and of substantially the same length. The Felton state ditch extends toward the northwest, starting in 15-141-46, and finds its outlet in sections 5 and 6 in 142-47. Ditch No. 7 intersects the state ditch a mile east of ditch

No. 6, and ditch No. 14 intersects it two miles north and two miles west of its intersection with No. 7.

The waters from the foothills at the east come into No. 6 through No. 7 and No. 7 receives some of the foothills' waters through the state ditch. The foothills are springfed and flow in winter time. The result is that when spring comes it is not unusual that No. 6 down towards the Red is solid ice from its bed to the top of its banks. It then is of no value for surface drainage until thawed out; and when the waters come from the foothills in the spring there is flooding. And even later, in summer, when the waters come in great quantities from the foothills, and they often do, No. 6, which is not of large capacity, is unable to care for them, and flooding results, from which the plaintiff and others south of No. 6 suffer.

A coulee starts in the west half of section 35, passes northerly through the plaintiff's land, intersects ditch No. 6 on the north side of section 26 some 1800 feet east of the northwesterly corner, and continues in a generally north and northwesterly direction, intersecting ditch No. 14 in its course, and finally empties into Wild Rice, something like 12 miles northwesterly of the plaintiff's land, and finds its way into the Red. The coulee is bridged where it crosses the section line between 35 and 26, and was bridged where No. 6 intersects it, many years before the construction of the ditch, and it is bridged at every section line north in the town.

West of the coulee is a ridge such as is common in that country trending in a generally northwesterly direction, crossing the southwesterly part of 26 and trending to the northwest. This ridge obstructs the flow of surface water and where ditch No. 6 passes through it its lowest point is somewhat higher than the lowest point of the ditch at the coulee.

In constructing No. 6 the county board wasted the dirt on the north side of the ditch, upon and in improvement of a public highway. The bridge over the coulee, a part of the highway, was taken out and the coulee filled with earth from the ditch. The spoil-bank was some four feet high. By it the natural drainage afforded by the coulee was destroyed and the surface waters accumulated in times of high water. Complaint was made to the county board by the plaintiff. Finally, on May 6, 1916, the board or a member of it, after a consideration of con-

ditions at a meeting held at the intersection of No. 14 and the coulee, directed the plaintiff to take certain culverts belonging to the county, which had been used on ditch No. 14, and make a spillway at the intersection of No. 6 with the coulee. The next day the culverts were taken there but before installation a direction was given not to install them. Nothing further was done in 1916, but in 1917, about the first of April, the plaintiff without further leave undertook to install the culverts, made an opening four feet wide and two feet deep in the spoilway, and before he completed the work the surface water broke through and made the opening which the county board proposes filling and which the plaintiff seeks to enjoin it from filling.

The effect of the spoil-bank is to back up the waters on the plaintiff's land and do him continuous damage. The effect of No. 6 carrying the foothills' waters is to bring large quantities down on the south side of the spoil-bank which, with other waters coming to it, cannot get across the ridge at the west except through the ditch which is inadequate to care for it, and, the coulee being obstructed, the land south of the ditch is flooded more than it otherwise would be. In No. 14, two miles north, there is a spillway in the coulee which in some measure at least takes care of a similar but probably less difficult situation.

It must be conceded that when a ditch is established and benefits and damages are assessed the matter is closed except so far as the statute provides for further proceedings, and that the proceeding is not subject to collateral attack as by an injunction. *Webb v. Lucas*, 125 Minn. 403, 147 N. W. 273, and cases; *State v. Lindberg*, 120 Minn. 147, 139 N. W. 286, and cases; *Jacobson v. County of Lac qui Parle*, 119 Minn. 14, 137 N. W. 419; *Slingerland v. Conn*, 113 Minn. 214, 129 N. W. 376, and cases; *Dunnell*, Minn. Dig. and 1916 Supp. §§ 2839, 2839a.

The plans and specifications are not before us. It is not affirmatively shown that there was or was not a provision for culverts. It was doubtless intended that the spoil bank should be on the north side of the ditch just where it was placed. Naturally it would not be put on the south, and used for a turnpike, in a level country like this where the general drainage was to the northwest. The ditch was constructed, as it was, and without culverts, just as the county board contemplated. Whether or not it was proper to construct the ditch without culverts the ditch

proceeding is now closed and res adjudicata and it cannot be attacked collaterally as it is sought to do in this case.

In view of G. S. 1913, § 5526, providing that when a ditch runs along a highway, and the earth from it is placed on the highway so as to form a turnpike, the highway or turnpike "shall be provided with sufficient and suitable culverts or openings so as not to obstruct the natural flow of surface water, in time of high water," the writer is of the opinion that a landowner, situated as is the plaintiff, is entitled to the maintenance of culverts or openings to the extent stated, and that the construction of the ditch with none provided, and the closing of the ditch proceeding, do not take away his right and that he is not barred upon the theory of res adjudicata. In his judgment the trial court was right and its order should be affirmed. The view of the majority being to the contrary, the order is reversed.

Order reversed.

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**KAREN MOLSTAD, AS ADMINISTRATRIX OF THE ESTATE  
OF ANDREW S. MOLSTAD, DECEASED, v. MINNEAPOLIS  
& ST. LOUIS RAILROAD COMPANY AND OTHERS.<sup>1</sup>**

July 11, 1919.

No. 21,292.

**Master and servant — failure to signal track worker — evidence.**

1. An engine of defendant railroad company ran over a track workman working in the dark on the tracks, with a lighted lantern beside him. There is evidence that the engineer and fireman were negligent in failing to give customary signals and failing to keep a proper lookout ahead.

**Assumption of risk.**

2. Deceased did not assume the risk of their negligence.

Action in the district court for Freeborn county to recover \$30,200 for the death of plaintiff's intestate. The facts are given at the beginning of the opinion. The case was tried before Catherwood, J., who at the

<sup>1</sup>Reported in 178 N. W. 563.

close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for \$5,100. From an order denying their motion for judgment notwithstanding the verdict or for a new trial, defendants appealed. Affirmed.

*R. B. Alberson, W. C. Odell and M. M. Joyce*, for appellants.

*Barton & Kay*, for respondent.

HALLAM, J.

Andrew S. Molstad was yard foreman of defendant railroad company at Albert Lea. Before daylight on the morning of March 7, 1916, he was called to clear the ice and snow from a switch in the yards. While engaged in this work, he was run over by an engine of defendant company and killed. Plaintiff, as administratrix of his estate, brought this action for damages against the railroad company and the engineer and fireman, and recovered a verdict. Defendants appeal. Plaintiff charges negligence on the part of the engineer and fireman. Defendants deny negligence and contend that deceased assumed the risk of the danger to which he was exposed.

1. The engine was stopped at a coal chute about 25 feet south of the switch where deceased was working. The engineer started the engine south and moved it about 100 feet towards his train. He then thought of cleaning the ash pan, and reversed the engine and backed to a cinder pit, past the point where deceased was working. It was in this movement that deceased was killed.

There is evidence that the engine approached deceased without signal, without even ringing the bell though this was the custom in that yard. There is also evidence that deceased had placed a lighted lantern near him on the track in such position that the light was reflected towards the approaching engine and that neither the engineer nor the fireman saw either deceased or the light, though it was the business of each to be on the lookout. The evidence is clearly sufficient to establish negligence in failing to give customary signals, *Erickson v. St. Paul & Duluth R. Co.* 41 Minn. 500, 43 N. W. 332, 5 L.R.A. 786, and to keep a proper lookout for persons working on the track. *Kludzinski v. Great Northern Ry. Co.* 130 Minn. 222, 153 N. W. 529.

2. Deceased assumed the risk of injury from dangers and hazards

incident to his work, but did not assume the risk of injury arising from unusual negligence. *Greer v. Great Northern Ry. Co.* 115 Minn. 213, 218, 132 N. W. 6.

Order affirmed.

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**FIRST NATIONAL BANK, NORTHFIELD v. GALEN H. COON  
AND ANOTHER.<sup>1</sup>**

July 11, 1919.

No. 21,318.

**Appeal and error — failure to except or assign error in trial court.**

1. The technical objection to the refusal of the court to strike the case from the calendar will not be considered where the record shows no exception to the ruling and no error assigned thereon in the motion for a new trial.

**Vendor and purchaser — notice of cancelation of sale contract sufficient.**

2. A notice to cancel a contract for the purchase of real estate, for failure to make the stipulated payments, examined and held sufficient as to form, signature and service, to comply with section 8081, G. S. 1913.

**Verdict sustained by evidence.**

3. The evidence supports the verdict to such an extent that this court is not warranted in setting it aside.

**Refusal to give requested instructions not error.**

4. No reversible error is found in the court's refusal to give requested instructions which are neither applicable nor accurate.

Action in ejectment in the district court for Rice county and to recover \$30 per month, the value of the use and occupation of the premises from the date of the cancelation of a certain contract for a deed until the termination of the action. The facts are stated in the opinion. The case was tried before Childress, J., who when plaintiff rested denied defendants' motion to dismiss the action, and a jury which returned a verdict in favor of plaintiff for \$240 and possession of the premises.

<sup>1</sup>Reported in 173 N. W. 431.

From an order denying their motion for a new trial, defendants appealed. Affirmed.

*Ch. Jaudon Berryhill*, for appellants.

*R. D. Barrett*, for respondent.

HOLT, J.

The appeal is by defendants from an order denying a new trial after verdict against them, the action being in ejectment.

There was a former appeal wherein defendants prevailed. From the recitals in this record we take it the costs were taxed and judgment entered in this court; that the costs were paid, and, although remittitur issued prior to the service of notice of trial in the district court, it was not filed in that court at the time the notice was served, but was filed when the case came on for trial and defendants' motion to strike it from the calendar was made and denied. The refusal to strike is the first assignment of error. The record does not show any exception to the ruling, nor did the motion for a new trial invite a consideration of the point. We do not think it is here.

The property involved is a house and lot in the city of Northfield, Minnesota, conveyed to plaintiff in 1906 by George M. Coon, brother of defendant Galen H. Coon, the record title of which property has ever since appeared in plaintiff. The complaint alleged ownership in plaintiff on March 22, 1910, and that on said date it sold the same to defendant Galen H. Coon, taking from him a contract for deed under the terms of which he agreed to pay \$2,025 for the property; that he paid only \$50 of that sum at the time; that there was due and unpaid on said contract the sum of \$2,389.40 on December 5, 1916, and that on December 11, 1916, plaintiff caused to be served a written notice of cancelation of the contract; that more than 30 days have expired since said service and no part of the sum due has been paid. The answer, aside from an admission of possession and of the service of the purported notice of cancelation, was in substance that the conveyance in 1906 of George M. Coon to plaintiff was a mortgage and not a deed. The trial court held the notice of cancelation sufficient in form and substance to terminate the contract, and the jury determined that the conveyance



from George M. Coon to plaintiff in 1906 vested the full and absolute title in plaintiff and was not a mortgage.

The objections to the notice of cancellation are:

(a) That it does not state the correct amount due and unpaid. The statute does not require the amount to be stated. *Hage v. Benner*, 111 Minn. 365, 127 N. W. 3.

Furthermore, the record does not show the amount to be incorrect. Defendants frankly admit it to be not far from right and as frankly admit that they do not know what the exact amount should be.

(b) The notice required payment of the amount in default within 30 days after service, in strict conformity with the provision of the statute on the subject (section 8081, G. S. 1913), but added this sentence: "Said cancellation and termination of said contract to take effect January 12th, 1917." This last date was 32 days after the service of the notice. It is claimed that this creates an ambiguity as to the last day for removing the default and vitiates the notice. We think not. At most it gives defendant two additional days of grace. On principle it does not tend to prejudice the vendee's rights any more than a similar inconsistency as to the last day to answer summons tends to prejudice the rights of a defendant, and it was held not to so result in *Gould v. Johnston*, 24 Minn. 188.

(c) The notice purported to be given in behalf of plaintiff and was signed "R. D. Barretr, Attorney for First National Bank, Northfield, Minnesota." Defendants claim that authority to the attorney must be in writing, for the notice is one effecting the transfer of real estate in case there is a failure to remove the default. The notice itself must undoubtedly be in writing for a copy thereof must be recorded. But there is no requirement that it be signed personally by the vendor or that the authority to the vendor's agent or attorney to give or sign the notice shall be in writing. Until the enactment of section 8119, G. S. 1913, it was not deemed necessary that the authority to an attorney to foreclose a mortgage by advertisement be in writing. In *Martin v. Baldwin*, 30 Minn. 537, 16 N. W. 449, a notice of a mortgage foreclosure sale by advertisement was signed thus "Geo. H. Spry, Attorney for said Assignee." The opinion says: "That the notice was subscribed as it was, does not, we think affect its sufficiency."

(d) The contention that the notice is not specific enough as to the particular default is answered by *Hage v. Benner*, *supra*.

(e) There is no merit in the claim that the notice was not served by a proper person. Said section 8081 provides that the notice shall be served in the same manner as a summons in the district court. Such a summons may be served by the sheriff "or by any other person not a party to the action" (section 7730, G. S. 1913). The proof here shows service by a person not a party to the contract and is good service. Moreover the answer admits service of the purported notice at or about the time alleged in the complaint.

(f) The last objection to the notice urged on the appeal, but apparently not presented to the court below, is that the notice required the sum in default to be paid to plaintiff's attorney, at his office in Minneapolis, while under the contract the purchase price was payable at Northfield. Unquestionably, a payment or tender of the amount due to the bank at Northfield would have avoided a cancelation of the contract, notwithstanding the notice stated another place for the act. It is true, the notice could not change any of the terms of the contract, but the law, above cited, under which the notice is given, does not require it to designate a place for removing the default, and, while the attempt to designate another place than the one specified in the contract must be regarded as of no effect, it does not destroy the efficacy of the notice. The notice did convey in no uncertain way that the vendee in the contract was in default, and that a sum certain must be paid or the contract would be canceled under the provisions of the statute. Defendants had the option to pay to plaintiff at Northfield or to its attorney at Minneapolis. The defendants were not misled. The record discloses no effort to remove the default, and no claim that they either would or could pay any part of the purchase price long past due. The notice was in substantial conformity to said section 8081.

The next contention is that the evidence does not sustain the verdict that the deed from George M. Coon to plaintiff vested an unconditional and absolute fee title, and was not a mortgage. It appears that in March, 1899, George M. Coon gave a mortgage to plaintiff upon the property to secure a note for \$1,375.60, and in December of the same year gave a second mortgage thereon to secure a note for \$500. The

notes were not paid and other indebtedness from the mortgagor to the mortgagee accumulated, so that, it is claimed by plaintiff, a settlement was had in 1906 when there was an outright sale and purchase of the lot, evidenced by the deed mentioned, for \$1,875, which sum was applied upon the indebtedness then existing, and notes given or adjustments made for the balance. Defendants contend that the transaction was but a renewal of the mortgage indebtedness, and with the understanding when the contract for deed was executed that Galen H. Coon assumed and agreed to pay this indebtedness. The transaction occurring prior to the enactment of section 8078, G. S. 1913, the court instructed the jury that "once a mortgage, always a mortgage," hence the presumption as between mortgagor and mortgagee was that the transfer was for additional security, and that the burden was upon plaintiff to satisfy them by a fair preponderance of the evidence that the warranty deed was intended to be a sale. If it was not proven to be an absolute sale, there could be no recovery, for a mortgagee out of possession cannot obtain possession without foreclosure. The evidence was such that the jury might have found either way on that issue. It will serve no useful purpose to attempt to set out the salient features for either side. Suffice it to say that an attentive reading satisfies us that the verdict has such support that we are not warranted in setting it aside.

No error can be predicated upon the refusal to give two requested instructions. The one purported to call the attention of the jury to a statute which appellants claim not to be applicable to the case and which nowhere in the charge was held applicable. The other was properly refused, because there was no real dispute that the notice of cancellation stated the amount due with substantial accuracy, and it is not true as a proposition of law that such notice is void, unless the amount due be truly and exactly stated. As before remarked, section 8081, G. S. 1913, does not require the amount to be stated in the notice.

We discover no substantial error in the rulings of the trial court.  
Order affirmed.

JOHN BERG v. VILLAGE OF CHISHOLM.<sup>1</sup>

July 11, 1919.

No. 21,322.

**Eminent domain — street improvement — measure of damage to abutting owner.**

1. The general rule of damages for injuries resulting to abutting property from street improvements made by municipal authority is the difference in the value of the property before and after the improvements are made.

**Same — change of street grade — cost of retaining wall.**

2. In the determination of which consideration will be given to the reasonable cost and expense necessary to a restoration of the property to its former condition of usefulness, including the construction of a retaining wall where necessary, and other items of specific repairs rendered necessary by the change of the street grade.

**Same — diminution in value — special damages.**

3. The property owner is not entitled to the items of special damages referred to in addition to the diminution in value.

**Same — encroachment on boulevard not a defense.**

4. The fact that a retaining wall made necessary by such improvements encroaches for the space of about eight inches upon a strip of land reserved for boulevarding purposes between the sidewalk and the lot line, *held* not a bar to the property owner's right to damages caused by the street improvements, and the fact of such encroachment does not constitute an equity pleadable as a defense under G. S. 1913, § 7756.

**Same — defendant not entitled to relief.**

5. The conclusions of the trial court that defendant was not entitled to affirmative relief under its equitable defense are sustained by the evidence.

Action in the district court for St. Louis county to recover \$1,500 damages to plaintiff's real estate caused by lowering the grade of the street. The facts are stated in the opinion. The case was tried before

<sup>1</sup>Reported in 173 N. W. 423.

Hughes, J., who made findings that the retaining wall mentioned in the opinion did not constitute a permanent encroachment upon the street in question, denied an injunction, and a jury which returned a verdict for \$607, of which the sum of \$157 was allowed as damages for the construction of the retaining wall. From the judgment of January 18, 1919, entered upon the verdict, and from the judgment of January 27, 1919, entered upon the court's findings, defendant appealed. Affirmed on condition plaintiff remit from the amount of the verdict the cost of the retaining wall—\$157.

*George K. Trask, Warner E. Whipple and Frank E. Randall*, for appellant.

*Alger R. Syme*, for respondent.

BROWN, C. J.

Action for damages alleged to have resulted from a change of the grade of the street fronting plaintiff's property. Plaintiff had a verdict and defendant appealed from the judgment entered thereon.

The facts are not in dispute. Plaintiff owns and occupies two lots fronting on Elm street in the village of Chisholm, his residence being situated on one, and a building used for store purposes on the other. Prior to the commencement of the action the municipal authorities made certain improvements in the street, lowering the grade thereof, paving the roadway, and constructing a cement sidewalk along the street line abutting upon plaintiff's premises. The grade was lowered something over two feet, leaving plaintiff's property in a situation rendering necessary the erection of a retaining wall along the line of the sidewalk, and also certain other changes to conform his premises to the conditions thus brought about. The complaint alleges that the construction of the retaining wall cost the sum of \$300, and that the plaintiff's premises were, by the acts complained of, diminished in value to the extent of \$1,200. Judgment was demanded for \$1,500.

Defendant answered, admitting plaintiff's ownership of the property and the street improvements complained of, but alleged that no damages resulted to plaintiff's premises therefrom, on the contrary that they were thereby benefited and enhanced in value, and, further, that the retaining wall constructed by plaintiff projected into the street a

distance of some eight inches, constituting a wrongful and unlawful encroachment upon the street to the detriment of the public welfare. As relief the village demanded that plaintiff take nothing by the action and that the maintenance of the retaining wall in the street be restrained and enjoined.

The jury returned a verdict, assessing plaintiff's damage at the sum of \$607, which amount included \$157, the cost of the retaining wall. The equitable issues presented by the answer were submitted to the court by consent of counsel, and, upon findings setting out the facts substantially as here stated, and in another respect to be stated later, the court denied the equitable relief demanded by defendant. Judgment was entered accordingly and defendant appealed.

Several questions presented by the assignments of error, which we do not sustain, may be disposed of without unnecessary discussion. The action insofar as it involves plaintiff's claim for damages comes within the rule stated and applied in our former decisions, and his right to recover such damages as come within the rule is clear. *Dyer v. City of St. Paul*, 27 Minn. 457, 8 N. W. 272; *Sallden v. City of Little Falls*, 102 Minn. 358, 113 N. W. 884, 13 L.R.A.(N.S.) 790, 120 Am. St. 635; *Olson v. City of Albert Lea*, 107 Minn. 127, 119 N. W. 794; *Wallenberg v. City of Minneapolis*, 111 Minn. 471, 127 N. W. 422, 856, 20 Ann. Cas. 873; *Morgan v. City of Albert Lea*, 129 Minn. 59, 151 N. W. 532. The notice of claim served upon the city in compliance with G. S. 1913, § 1300, if the statute be applicable, was sufficient. The statute was held inapplicable in *Manson v. City of Chisholm*, 142 Minn. 94, 170 N. W. 924. Our examination of the record leads to the conclusion that the evidence supports the verdict, and that there were no errors in the instructions to the jury, save upon the question of the measure of damages. That error presents the only question requiring special consideration in the opinion, to which we come directly, passing all other assignments without further comment.

The trial court charged the jury that plaintiff was entitled to recover, if they found any injury to his property at all, the difference between the value of the property before and the value after the street improvements were completed, and in addition thereto the reasonable cost and

expense of constructing a retaining wall, rendered necessary by lowering the street grade.

The rule of damages for property injuries of the kind is the diminished value thereof, or, as expressed by the trial court, the difference between the value of the property before and after the street improvements are completed. 3 Dunnell, Minn. Dig. § 9649; Ziebarth v. Nye, 42 Minn. 541, 44 N. W. 1027; Morgan v. City of Albert Lea, 129 Minn. 59, 151 N. W. 532. The rule has this qualification that, if the cost and expense of restoring the property to its former condition of usefulness be less than the difference in value, then such cost and expense is the measure of the property owner's relief, subject to deductions for such special benefits as may be shown. The rule is well settled in this state and applies to the case at bar. As bearing on the question of the difference in value, various elements of specific as distinguished from general damage or injury may be shown and considered by the jury, such as the loss of lateral support by lowering the grade of the street, the construction of a retaining wall when necessary, and other legitimate items of expense reasonably essential to a restoration of the property to its former useful condition. Morgan v. City of Albert Lea, *supra*. But the ultimate inquiry is the difference in value before and after, and the amount thereof will include the special items referred to. The property owner is not entitled to both. He was permitted to recover both in this action by the instructions of the court, and the general verdict rendered, founded on the difference in value, shows on its face that an additional amount of \$157 was included therein as the cost of the retaining wall.

To this extent there was error in the instructions and in the verdict. But a new trial should not be granted, for the error may be corrected by a reduction of the verdict, which will be ordered.

2. The equitable cross action of defendant by way of answer asking for relief against the maintenance of the retaining wall as it extends eight inches over the street line, has no proper place in the case. The fact that the wall so encroaches on the street does not constitute a defense to plaintiff's action for damages, nor otherwise bar or affect his right to recover. It is not therefore an equity within the meaning of section 7756, G. S. 1913; Dunnell, Minn. Pl. 340. However, the par-

ties voluntarily submitted the matter to the trial court, and findings were made setting out the facts heretofore stated, and in addition thereto that the municipality has never taken possession of the part of the street so encroached upon, the same being a strip 22 inches wide between the sidewalk and the lot line, reserved by the plat for boulevarding purposes, or made any attempt to improve it for that purpose, and for that reason denied the relief demanded. The findings of the court are sustained by the evidence and we concur in the conclusion of law as announced by the learned trial court. Affirmative relief was properly denied. The effect of the encroachment upon the strip of land in question will be detrimental to plaintiff and not the municipality. If it is ever taken possession of and improved by the public authorities for the purpose stated, plaintiff may be required to remove the wall at his own cost and expense.

The order, therefore, will be that the judgment in plaintiff's favor on the verdict be affirmed, on condition that he remit therefrom within ten days after the going down of the mandate the sum of \$157, the cost of the retaining wall; if he shall elect not to so remit from the verdict, the judgment in this action will be reversed and the cause remanded for a new trial. The judgment denying the equitable relief demanded by defendant is affirmed.

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## STATE v. CAVOUR MINING COMPANY.<sup>1</sup>

July 11, 1919.

No. 21,337.

### **State mining lease construed — minimum royalty — no subsequent reductions.**

A state mining lease is in fact as it is in form a lease and not a conveyance of ore in place. It provides that there shall be a minimum output of 5,000 tons annually, and that in case such amount is not removed the lessee shall pay the state a royalty of 25 cents per ton on 5,000 tons. There is no provision that if the lessee does not in any one year take such amount the required annual payment paid the state for such year may be applied wholly or in part on ore taken in subsequent years

<sup>1</sup>Reported in 173 N. W. 415.



in excess of the stipulated minimum. It is ~~held~~ that the minimum royalty is the agreed compensation for the use and occupancy for a year of the property demised for the purposes and uses and in the manner and with the rights fixed by the lease, and for it the lessee gets, among other things, the right to take within the year 5,000 tons of ore; that it is not the purchase price of 5,000 tons of ore which if not taken within the year may be subsequently taken; that it is not advance royalty, and that the lessee who takes in a given year no ore or less than the minimum cannot have his annual payment of \$1,250 for such year applied wholly or in part on royalties accruing in subsequent years on ore mined in such years in excess of the minimum.

Action in the district court for St. Louis county to recover \$5,181.71. The answer alleged that under the provision of its lease requiring payment for 5,000 tons of ore per year whether that quantity was mined or not it had paid \$1,633.41 before January, 1916, for which, by the terms of the lease, it was entitled to credit when sufficient ore should be mined. The case was tried before Fesler, J., who made findings and ordered judgment in favor of plaintiff for \$1,633.41 and interest. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

*Leon E. Lum*, for appellant.

*Clifford L. Hilton*, Attorney General, and *Egbert S. Oakley*, Assistant Attorney General, for respondent.

**DIBELL, J.**

This is an action by the state to recover the minimum royalty on a state mining lease for a period when no ore was taken. There were findings and judgment for the state and the defendant appeals.

The state lease provides that the lessee shall on the first day of August in each year pay to the state treasurer the sum of \$100 until by the terms of the lease 1,000 tons is required to be mined. One thousand tons is required to be mined within five years after the completion of a railroad within one mile of the land leased. The lease then provides: "And that thereafter there shall be mined and removed therefrom at least five thousand tons annually, and that in case the part \* \* \* of the second part shall not annually remove from said land five thousand tons, as above provided, the part \* \* \* of the second part

shall pay to the said state treasurer annually a royalty of twenty-five cents per ton on five thousand tons, which payment shall be made quarterly as hereinbefore specified." G. S. 1913, § 5315. The lessee is given the right to terminate the lease on 60 days' notice.

We have consistently held from the beginning that the state mining lease is not a conveyance of ore in place but that it is in fact as it is in form a lease. *State v. Evans*, 99 Minn. 220, 108 N. W. 958, 9 Ann. Cas. 520; *Boeing v. Owsley*, 122 Minn. 190, 142 N. W. 129; *State v. Royal Mineral Assn.* 132 Minn. 232, 156 N. W. 128, Ann. Cas. 1918A, 145. This view is accepted by the Federal courts. *Von Baumbach v. Sargent Land Co.* 242 U. S. 503, 37 Sup. Ct. 201, 61 L. ed. 460; *United States v. Biwabik Min. Co.* 247 U. S. 116, 38 Sup. Ct. 462, 62 L. ed. 1017. It is the generally accepted doctrine relative to similar leases. In the case first cited this conception of the character of the mining lease was found important by this court in determining the constitutionality of the mining lease statute; in the second in determining the course of descent; and in the third in determining a question of taxation; and by the Federal courts, in the cases cited from them, in determining whether royalties are income within certain Federal tax laws. And it is now important in the case before us in determining the effect of the provision for the payment of royalty on the minimum output, when it is not taken at all or but in part in a given year, but in subsequent years amounts in excess of the minimum are taken.

The defendant concedes that it must pay 25 cents a ton on 5,000 tons, or \$1,250, each year, whether or not it takes 5,000 tons. Its contention is that if in any one year it does not take ore, or does not take so much as 5,000 tons, it may apply the minimum royalty paid that year wholly or proportionately on ore subsequently taken in excess of the minimum. The state claims that the minimum royalty of \$1,250, which concededly must be paid each year, cannot be applied on royalties subsequently accruing on ore taken in excess of the minimum.

The minimum royalty is the compensation agreed by contract to be paid for the use and occupancy for a year of the property demised for the purposes and uses and in the manner and with the rights fixed by the lease, and for it the lessee gets, among other things, the right to take within the year 5,000 tons of ore. It is not the purchase price of 5,000

tions, which, if not taken, may be subsequently taken. It is not a payment of advance royalty. Many leases provide that if the minimum output is not mined in any one year the minimum royalty paid shall be applied on royalty accruing in subsequent years when more than the minimum tonnage is removed. The state lease does not. If the state lessee has such right it must be put in the lease by construction.

The case of *Nelson v. Republic Iron & Steel Co.* 153 C. C. A. 211, 240 Fed. 285, decided by the circuit court of appeals of this circuit, construing a Minnesota lease of similar form, is substantially in point. It holds that in the absence of a contract provision to that effect the minimum payment for a given year, when no ore or less than the minimum is taken, cannot be applied on subsequently accruing royalties on ore taken in excess of the required minimum. The cases support this holding and we cite the following as of direct or indirect value: *Woodruff v. Gunton*, 222 Pa. St. 384, 71 Atl. 851; *Lehigh Valley Coal Co. v. Everhart*, 206 Pa. St. 118, 55 Atl. 864; *Denniston v. Haddock*, 200 Pa. St. 426, 50 Atl. 197; *Berwind-White Coal Min. Co. v. Martin*, 124 Fed. 313, 60 C. C. A. 27; *Swan v. Brown*, 8 Kan. App. 505, 56 Pac. 141; *Wonsetler v. Andrews*, 58 Oh. St. 551, 51 N. E. 168; *Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. ed. 1215. The state lease does not, considering alone the language it uses, or considering it with due reference to the history of mining development and mining conditions when the state authorized the lease, evince an intent that the payment of royalty on the minimum output, when no ore or less than the minimum is taken in one year, shall be applied wholly or proportionately on royalties accruing in subsequent years on ore mined in excess of the minimum, and there can be no such application.

Judgment affirmed.

J. EMERSON GREENFIELD v. CHARLES A. OLSON AND  
ANOTHER.<sup>1</sup>

July 11, 1919.

No. 21,875.

**Vendor and purchaser — equitable title of vendee transferable.**

1. An executory contract for the sale of land vests in the vendee an equitable title to the land; a title and interest which he may convey or otherwise transfer to others.

**Same — lease from vendee to vendor — conveyance by vendor.**

2. A subsequent lease of a part of the land by the vendee to the vendor is valid, and the rights thus granted to the vendor will not be affected by a deed thereafter delivered by him to the grantee in performance of the executory contract of sale.

**Same — deed relates back to date of contract.**

3. The deed will relate back and take effect as of the date of the contract.

Action in the district court for Itasca county to recover possession of certain premises. The answer alleged that on November 10, 1903, plaintiff and Charles A. Olson entered into a contract for the sale to Olson of certain lands in Itasca county; that Olson paid plaintiff the full purchase price of the land and demanded conveyance thereof, but that plaintiff refused to convey the land, and asked for a conveyance or, if that could not be had, for \$6,000 damages. The case was tried before Stanton, J., who made findings and ordered judgment in favor of defendants and that plaintiff execute a warranty deed of the land to defendants. Plaintiff's motion to amend the findings was granted in part and denied in part. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

*Howard Anderson and John Brennan*, for appellant.

*H. W. Stark*, for respondents.

<sup>1</sup>Reported in 173 N. W. 416.

BROWN, C. J.

Plaintiff was the owner of the land in controversy in this action and on the eighteenth day of November, 1905, entered into an executory contract for the sale thereof to defendant Charles A. Olson. The contract was in the usual form of such instruments, and obligated plaintiff to convey the land to defendant by a good and sufficient warranty deed, subject to certain mineral reservations, upon the payment of the purchase price, according to the terms of a promissory note then executed by defendant to plaintiff and bearing interest at the rate of 8 per cent per annum; a down payment of \$100 was made at the time. The mortgage registry tax was subsequently paid and the contract duly recorded in the office of the register of deeds.

Subsequent to the execution of the contract, on December 8, 1908, defendant, his wife joining therein, by written instrument executed for the purpose, leased to plaintiff the shore rights and privileges of a certain lake situated upon the land for the term of 25 years at the annual rental of one dollar. The lease contained all stipulations and agreements deemed by the parties necessary to express the contract rights of each, but they are of no special importance and require no further mention.

There was default in the payment of the deferred instalments of the purchase price of the land and on February 23, 1917, plaintiff duly gave notice under the statute of the cancelation of the contract, unless within 30 days defendants should come forward and make payment of the balance due with interest, designating therein one H. J. Scott as plaintiff's representative to accept and receipt for the money when paid. Within the time limited by the notice defendants paid to Scott the full amount due on the contract, for which Scott formally executed and delivered to them a written receipt in acknowledgement thereof. The findings on this subject are fully supported by the evidence.

We digress here to remark that a controversy between plaintiff and his agent Scott, of which considerable is made in the brief of appellant, is of no special importance in the case. The controversy has reference to the insistence by Scott that plaintiff execute and deliver to defendants a deed of the property in accordance with the terms of the executory contract of sale. Plaintiff, as we understand the record, refused to ac-

cept the money on that condition, and Scott deposited the amount in a bank subject to his order on delivery of the proper deed. We discover no misconduct on the part of Scott, and, though plaintiff was dissatisfied with his conduct in the matter, the fact remains that he was plaintiff's agent and the payment of the money to him fully discharged defendants' obligations under the contract, entitling them to a deed of the land as stipulated therein. We therefore pass that feature of the case without further remark.

Referring again to the fact that subsequent to the execution and delivery of the executory contract of sale defendants leased to plaintiff the lake shore rights heretofore stated, we come to the real controversy in the case. Plaintiff refused to convey the land to defendants, unless there was inserted in the deed a clause reserving and protecting his rights under the lease. Defendants claimed that the lake shore lease had nothing to do with the executory contract of sale, and declined to accept a deed containing such a reservation, insisting that the lease be left to stand on its own foundation.

There is nothing of substance in the dispute. Defendants are entitled to a deed conveying the property to them in conformity with the terms of the contract of sale. The execution of such a deed, though subsequent in point of time to the lease, will not operate in a merger of the leasehold estate. The executory contract of sale vested in defendant the equitable title to the land, a title and interest which he could convey or otherwise transfer to others. *Stearns v. Kennedy*, 94 Minn. 439, 103 N. W. 212; 3 Dunnell, Minn. Dig. § 10045. The lease of the lake shore to plaintiff was valid, unless void for want of a consideration, a question we do not stop to consider, and vested in plaintiff the rights thereby granted precisely as though he had been a stranger to the title. A conveyance by him of the fee title, in performance of the executory contract of sale, will not affect his leasehold rights. The conveyance will relate back and take effect as of the date of the executory contract, leaving intact the rights granted by the lease. *Gilbert v. McDonald*, 94 Minn. 289, 102 N. W. 712, 110 Am. St. 368; *Nicholson v. Congdon*, 95 Minn. 188, 103 N. W. 1034; *State v. Itasca Lumber Co.* 100 Minn. 355, 111 N. W. 276.

The trial court was therefore right in directing a conveyance of the

land in performance of the contract of sale and the judgment appealed from is affirmed.

D. H. EXRIEDER AND OTHERS v. P. H. O'KEEFE.<sup>1</sup>

July 11, 1919.

No. 21,457.

**Election contest — valid petition — jurisdiction not ousted by evidence of fraud.**

1. Where the petition for an election contest is signed by the requisite number of legally qualified petitioners and the notice has been duly served, the contestee cannot divest the court of jurisdiction by showing at the trial that certain of the petitioners had been induced to sign the petition by false representations, and evidence offered for that purpose was properly excluded.

**Corrupt Practices Act — evidence of violation.**

2. The evidence sustains the finding that appellant had violated the Corrupt Practices Act.

Twenty-nine legal voters of Dakota county petitioned the district court for that county to oust P. H. O'Keefe from the office of county attorney after being elected to that office. The matter was heard before Bardwell, J., sitting for one of the judges of the First judicial district, who made findings and ordered that P. H. O'Keefe be removed from office and his certificate of election annulled. From an order denying his motion for a new trial, P. H. O'Keefe appealed. Affirmed.

*C. C. McElwee, Albert Schaller, M. C. Brady and P. H. O'Keefe, for appellant.*

*Jamison, Swan, Stinchfield & Mackall, for respondents.*

TAYLOR, C.

At the general election held in November, 1918, the appellant was a candidate for the office of county attorney of Dakota county and was declared duly elected. Thereafter 29 legal voters of the county joined in a petition to oust him from the office on the ground that he had vio-

<sup>1</sup>Reported in 173 N. W. 434.

lated the Corrupt Practices Act. The trial court found as facts that appellant, while a candidate for the office of county attorney of Dakota county, had paid for and furnished intoxicating liquor to several qualified voters of that county, for the purpose and with the intent of influencing such voters to vote for him at the election, and that he had published and distributed a circular containing false charges against his opponent, and as a result of these findings rendered a judgment of ouster.

Only two questions are presented: Whether the findings of fact are sustained by the evidence; and whether the court erred in excluding evidence offered for the purpose of showing that 11 of the signers of the petition were induced to sign it by false representations concerning the nature and purpose of the proceeding.

That furnishing intoxicating liquor to voters for the purpose of influencing their votes constitutes a violation of the law, section 576, G. S. 1913, and is sufficient to justify a judgment of ouster is not questioned. Several witnesses testified to the furnishing of the liquor. Appellant contends that these witnesses were actuated by malicious motives and are unworthy of belief in view of the opposing testimony. This court has stated repeatedly that it is the province of the trial court, not of this court, to determine the weight and credit to be given to the testimony of the different witnesses where such testimony is conflicting, and that the province of this court is limited to determining whether there is any substantial evidence to sustain the conclusion of the trial court. The record contains direct and positive testimony of the violation of the statute, and amply supports the finding. As this finding is sufficient to sustain the judgment, consideration of the other alleged violations of the law is unnecessary.

Appellant offered to show by certain signers of the petition that they did not read the petition but signed it on the representation that "it was only a petition to procure a recount of the ballots," and not to oust appellant from office, and that they would not have signed it had they known its actual contents. If the names of these signers were stricken from the petition, it would reduce the number of signers below 25, the number required by the statute, section 599, G. S. 1913, in order to institute such a contest. If proving the facts which appellant offered to



prove would have ousted the court of jurisdiction, the exclusion of the proffered evidence was error, otherwise it was not. In *Miller v. Maier*, 136 Minn. 231, 161 N. W. 513, where a similar contest was instituted and certain of the petitioners sought to withdraw their names from the petition on the ground that they had not fully understood its contents, the court said:

"Contests of this character based upon a statutory petition, signed and sworn to by a large number of electors for the purpose of setting a contest in motion, constitute the beginning of a very important litigation, in which the public has a deep interest, and men should not lightly be permitted to stultify themselves by saying that they did not know what they were doing when they signed an instrument of that gravity.  
\* \* \* The filing and serving of the petition, together with the notice, conferred upon the court power to act in the premises, and, after jurisdiction is thus conferred and the court has acted thereon, the jurisdiction cannot be defeated by any number of such petitioners subsequently withdrawing from the petition."

We think the present case falls within the rule there stated. Appellant seeks to distinguish the two cases on the ground that in the present case the signatures were procured by false representations. These men were legally qualified petitioners and have made no application to have their names withdrawn from the petition. The petition was in proper form and when it was filed and the notice served, the court became vested with jurisdiction, and was required to proceed and determine whether appellant had violated the law. It is of vital interest to the public that the laws enacted for the purpose of freeing elections from improper influences be obeyed. And, although the contest was initiated by the petitioners, it is authorized and prosecuted for the purpose of promoting the public welfare, and not for the purpose of promoting any personal interest of the petitioners. They have no other or different interest in it than other members of the body politic. Whether or not a petitioner who has been induced to sign the petition by false representations may have his name stricken therefrom on proper application made at the proper time, we are clear that the appellant could not raise this

question after the time for filing a petition had expired, and that he was not entitled to litigate it at the trial. It follows that the ruling was correct and the order of the trial court must be and is affirmed.

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THE FIRST NATIONAL BANK OF PHILLIPS v. R. D.  
DENFELD.<sup>1</sup>

July 18, 1919.

No. 21,241.

**Evidence of fraud in inception of note.**

1. The evidence sustains the finding that the note in suit was obtained from defendant by fraud.

**Evidence required of plaintiff to recover.**

2. This being shown it devolved on plaintiff to prove that it was a bona fide holder, in due course, for value, and without notice of the fraud. The jury's finding that plaintiff did not prove itself such holder is sustained.

**Bills and notes — title defective.**

3. The promissory note sued on was obtained from defendant by fraudulently misrepresenting the financial standing of a corporation whose bonds were to be issued in exchange for the note. This is *held* to make the title of the payee who thus procured the instrument defective. Negotiable Instruments Law, G. S. 1913, § 5867.

**Same — estoppel against defendant.**

4. The record does not show plaintiff entitled to a directed verdict on the ground of estoppel.

**Same — bona fide holder for value.**

5. The note mentioned was taken as collateral, in part, to other notes then transferred and indorsed by the same payee to plaintiff. At least \$4,100 of the amount realized for the notes transferred was placed to the credit of the payee upon plaintiff's books. There is no evidence that this sum or any part thereof was paid out before plaintiff was informed of the fraud practiced on the maker of the note in suit. Unless paid out before so informed, plaintiff could not be a holder in due course for value.

<sup>1</sup>Reported in 173 N. W. 661.

Action in the district court for St. Louis county to recover a balance of \$1,800 upon a promissory note. The facts are stated in the opinion. The case was tried before Dancer, J., who at the close of the testimony denied plaintiff's motion for a directed verdict, and a jury which returned a verdict for defendant. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, plaintiff appealed. Affirmed.

*Fred W. Hargreaves, Warner E. Whipple and Frank E. Randall, for appellant.*

*Wm. B. Phelps, for respondent.*

HOLT, J.

Suit on a promissory note executed by defendant and claimed to have been purchased in good faith by plaintiff before maturity and for value. The defense was that the note had its inception in fraud and that plaintiff was not a bona fide holder. Verdict for defendant and plaintiff appeals from the order denying its motion in the alternative for judgment or a new trial.

In Minneapolis a corporation by the name of Wood County Cranberry Company had a location, so did E. E. Galle & Company. E. E. Galle was an officer of both corporations. The first mentioned corporation owned a swamp of 50 acres in Jackson county, Wisconsin, subject to a \$12,000 mortgage, which had been foreclosed. Whether the swamp was in its natural state, except for the mortgage, is not disclosed, nor does it appear that the corporation owned any other property whatever. However, E. E. Galle & Company undertook to float \$37,500 worth of the Cranberry Company's 6 per cent profit sharing bonds on the strength of the existing equity of redemption in the swamp, and one of its solicitors sought out defendant, and succeeded in selling him \$2,000 worth of bonds at a premium of \$100. The note in suit was executed to E. E. Galle & Company in payment for the bonds. The next week plaintiff claims to have become the holder thereof, as collateral to an existing indebtedness of \$2,500 and to \$5,500 worth of other notes, sold and indorsed by the company to plaintiff. Notes to the amount of \$4,610, including defendant's were turned over as collateral at the time. The record discloses that the amount received for the \$5,500 notes discount-

ed was placed to the checking account of E. E. Galle & Company, but it does not show whether it has been drawn out. The original indebtedness of \$2,500 has not been fully paid, and on the collateral notes there is unpaid about \$800, besides what has not been collected upon defendant's note.

The court submitted the question of fraud to the jury, and also the question whether plaintiff took the note in due course of business without notice or knowledge of the fraud. If the defendant succeeded in proving that the note had its inception in fraud, there could be no recovery unless plaintiff proved by a fair preponderance of the evidence that it was a good faith purchaser for value before maturity, and the jury were so instructed in clear and concise language.

Most of plaintiff's able argument is directed to the propositions that the evidence does not sustain the charge of fraud, and does not warrant a finding that plaintiff was not a bona fide holder for value.

The only fraudulent representation made to defendant by E. E. Galle & Company's agent which, under the court's charge, could be considered, was whether it was represented that the Cranberry Company was in excellent financial condition. Defendant admits that he was told there was a slight mortgage upon the property. It appeared at the trial that there was a \$12,000 mortgage thereon, which had been foreclosed when the note was procured. The jury could well find that the representation, if made, was false and fraudulent, and induced defendant to execute the note. Misrepresentation of the financial standing of the corporation whose bonds are being disposed of, no doubt constitutes actionable fraud. It was not an opinion merely, as to the value of the bonds sold. It related to the financial standing of the party issuing the bonds and was a material fact. *Winston v. Young*, 47 Minn. 80, 49 N. W. 521. No attempt whatever was made to show that the Cranberry Company had any financial standing whatever, or that it owned any property beyond the equity of redemption, or that the equity was not a liability instead of an asset.

We are also of the opinion that the proof of the plaintiff being a bona fide holder for value is not so strong that a verdict to the contrary should be regarded as unsupported. Why the two corporations doing business in Minneapolis on the basis of a 50 acre swamp in Jackson

county, Wisconsin, should seek out the president and cashier of the plaintiff bank in Phillips, about 100 miles north of the land, to act as trustees for the bond purchasers of the one corporation, and the other corporation should have obtained a credit of \$2,500 on a note, and \$1,400 on an overdraft, were circumstances for the jury's consideration. So was the character of the cranberry enterprise to bankers. This question was asked of plaintiff's cashier: "Of course you knew as an officer of the bank about these notes that were outstanding in favor of Galle & Company; knew what they were given for, didn't you?" His answer was: "No, I can't say that I do." Further answers touching his knowledge and bona fides left it for the jury to determine whether he was to be believed or not. This witness' protestation of guileless ignorance touching the operations of the two corporations and their connection with the note and its consideration was not conclusive upon the jury. The note having been proven to have had its inception in fraud, the burden was on plaintiff to show itself a bona fide holder, in due course, without notice of the fraud, and this cashier and trustee for the bondholders was the only witness produced upon that proposition.

Plaintiff makes the claim that the fraud referred to in section 5867, G. S. 1913, is confined to deception in obtaining the signature and does not go to the fraud or deceit practised in inducing the signer to accept something in exchange for the instrument. The section provides that the title of a person who negotiates an instrument is defective within the meaning of the Negotiable Instruments Act "when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means," etc. The court in *Hill v. Dillon*, 176 Mo. App. 192, 161 N. W. 881, was inclined to hold that proof of failure of consideration does not render the title defective so as to cast the burden upon the holder to show that the instrument was acquired in due course, without notice of a defense. And *Kellogg v. Hale*, 190 Ill. App. 15, holds that the fraud referred to in the above section does not cover fraud or misrepresentation in respect to the consideration for the instrument, but must consist of some trick or device that induces the giving of one kind of instrument under the belief of the maker that he is giving one of a different kind, citing *Gray v. Goode*, 72 Ill. App. 504. This seems a narrow interpretation of the section quoted from, and does

not accord with such cases as *Johnson County Sav. Bank v. Walker*, 79 Conn. 348, 65 Atl. 132; *First Nat. Bank v. Wise*, 172 Iowa, 24, 151 N. W. 495; *People's State Bank v. Miller*, 185 Mich. 565, 152 N. W. 257; *Johnson County Sav. Bank v. Kornhauser*, 174 App. Div. 136, 160 N. Y. Supp. 913; *Demelman v. Brazier*, 198 Mass. 458, 84 N. E. 856; *Merchants Nat. Bank v. Branson*, 165 N. C. 344, 348, 81 N. E. 410; *Schlutheis v. Sellers*, 223 Pa. 513, 72 Atl. 887, 22 L.R.A.(N.S.) 1210. The fraud of the payee procured the note from defendant, and this cast the burden on plaintiff to prove that it became a holder in due course without notice of the defense.

The contention is also made that defendant is estopped from asserting fraud or any defense based thereon. This proposition does not appear to have received any attention at the trial, but in the motion for a directed verdict mention is made of it. We do not think plaintiff was entitled to a directed verdict on that ground. The facts are: Defendant never received the bonds, but long after the note came into plaintiff's hands there was an attempt to reorganize the Cranberry Company.

Defendant accepted some of the apparently worthless stock then issued, under the belief that plaintiff was a bona fide holder of the note, and that that stock was the only thing to be had out of the fraudulent transaction. It does not appear that defendant then knew of the situation, but rather that he was again victimized.

The record presents another obstacle to a recovery by plaintiff. This note was taken as collateral to secure the old \$2,500 note of E. E. Galle & Company to the bank, and also the notes amounting to \$5,500 transferred to it on August 3 and 5, 1913. The bank did not pay cash, but placed the \$5,500 to the credit of the company. It does not appear when this \$5,500 was checked out, or that it was ever withdrawn, except it may be assumed that \$1,400 was used to wipe out the overdraft. It does appear that a large part of the collateral notes was paid. The cashier testified that at the time of the trial E. E. Galle & Company was indebted to the plaintiff in the sum of \$2,166 on a renewal note of the one for \$2,500 which it held when defendant's note was obtained, besides it held two other notes on which there was the company's guaranteed indorsement. It is not shown that these other notes were the ones to which defendant's note was collateral. There is some indication that

about \$900 is unpaid on one of the notes discounted on August 3 or 5, 1913. But, for all that appears, plaintiff may have had enough of E. E. Galle & Company's funds on deposit to make itself whole when notice was received of a defense to the note in suit. *Union Nat. Bank of Columbus v. Winsor*, 101 Minn. 470, 112 N. W. 999, 118 Am. St. 641, 11 Ann. Cas. 204. We find no occasion to interfere with the result reached by the learned trial court.

The order is affirmed.

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**SUNDERMAN INVESTMENT COMPANY v. A. N. CRAIGHEAD  
AND OTHERS.<sup>1</sup>**

July 18, 1919.

No. 21,247.

**Who may redeem from tax sale.**

1. The statute gives the right to redeem from a tax sale to "any person claiming an interest" in the land, and any person who in good faith claims an interest therein which would be cut off by the tax title may protect such interest by redeeming from the sale.

**Taxation — sale annulled by redemption.**

2. A redemption merely annuls the sale.

**Same — defendant entitled to redeem.**

3. Defendant Craighead, having occupied the land in question for more than 20 years, had a sufficient basis for his claim to entitle him to make the redemption in controversy, although his fence had been removed several years before the redemption and he was not then in actual possession.

Action in the district court for Ramsey county to cancel and annul redemptions from certain tax sales and the record thereof. In his separate answer defendant Craighead alleged that he had been in open and notorious possession of the premises for 20 years. The case was tried before Hanft, J., who found that as against plaintiff defendant Craighead had an interest in the plot involved which entitled him to redeem within the time and in the manner prescribed by law, which he

<sup>1</sup>Reported in 173 N. W. 653.

had done, and ordered judgment in his favor. From an order denying plaintiff's motion to amend the findings and conclusions or for a new trial, plaintiff appealed. Affirmed.

*Allen & Straight*, for appellant.

*Harry S. Locke*, for respondent Craighead.

*Richard D. O'Brien* and *Harry H. Peterson*, for other respondents.

TAYLOR, C.

Two parcels of land lying in the western part of the city of St. Paul were bid in for the state for the taxes of 1912 at the tax sale held on May 11, 1914. In May, 1917, plaintiff acquired tax assignment certificates issued pursuant to this tax sale, and caused notices of the expiration of the time for redemption to be issued, and to be served on defendant Craighead and others. Defendant Craighead redeemed and received the usual certificates of redemption. Thereafter plaintiff brought this action to cancel and annul these redemptions and the record thereof, alleging as the ground therefor that Craighead had no interest in the land and no right to redeem from the tax sales. The court made findings of fact to the effect that Craighead had an interest in the land which entitled him to make the redemptions, and directed judgment in his favor. Plaintiff appeared from an order denying a new trial.

The only question presented is whether the evidence justifies the conclusion of the trial court that Craighead had sufficient interest in the property to entitle him to make the redemption.

The statute<sup>1</sup> provides: "Any person claiming an interest in any parcel of land sold for taxes \* \* \* may redeem the same within the time and in the manner in this chapter provided."

The tax purchaser makes his purchase subject to this right of redemption, and if it be exercised receives back his money with double the legal rate of interest. This sufficiently protects his rights. The redemption creates no rights in the land. It merely annuls the tax sale and leaves the title as if the sale had not been made. The statute gives the right to redeem to "any person claiming an interest" in the land. As the statute does not limit the right to redeem to those having an interest in the land, but extends it to all those "claiming an interest"

<sup>1</sup>[G. S. 1913, § 2137].



therein, any person, who in good faith claims an interest in the land which would be cut off by the tax title, may protect such interest by redeeming from the sale. While the redemptioner must doubtless have sufficient grounds for his claim to justify him in believing that he has an interest in the land, yet, as the statute gives the right to redeem to "any person *claiming* an interest," the holder of the tax certificate cannot defeat the redemption by merely showing that the asserted claim is invalid as against some third party. Where a claimant redeems to prevent his claim from being cut off by the tax title, the court cannot annul the redemption, unless it be shown that the claim is so devoid of merit as to warrant the conclusion that it was not made in good faith. The right to redeem is given and regulated by statute, and owing to the diversity of statutes the decisions of other courts are seldom directly in point, but the following consider somewhat similar questions: *Foster v. Bowman*, 55 Iowa, 237, 7 N. W. 513; *Campbell v. Packard*, 61 Wis. 88, 20 N. W. 672; *Roach v. State*, 148 Ala. 419, 39 South. 685; *Jamison v. Thompson*, 65 Miss. 516, 5 South. 107; and see *State v. McDonald*, 26 Minn. 145, 1 N. W. 832.

The facts on which Craighead bases his claim are practically undisputed. Blair street runs east and west through the western part of the city of St. Paul. Craighead purchased a lot on the south side of this street on which he established his residence in the spring of 1890. At that time the land adjoining his property on the east and south was wholly unoccupied and covered with brush and timber. He built a fence so as to inclose several acres of this land and used it as a pasture for more than 20 years. The court found that his possession was at all times hostile to the true owner. In course of time the land lying south of Blair street and east of Craighead's original lot was platted into building lots—one tract as Little and Hoyt's Addition, another as Paul Martin's Grove Addition, and others as other additions. About 1911. the city began opening and grading the streets through these additions and before the end of the following year had removed Craighead's pasture fence, or at least those parts of it within the street lines. People began buying lots in those additions and they are now well filled with dwellings. Craighead claimed title by adverse possession to the land which had been included within his inclosure, and relinquished his claim

to a dozen or more of the lots by executing quitclaim deeds to the holders of the original title. He had controversies with others who refused to recognize his claim, but seems not to have carried these controversies to the point of engaging in actual litigation.

Little and Hoyt's Addition comprises a strip of land 65.5 feet in width extending from Blair street south to Thomas street. Craighead's original lot forms a part of its western boundary. Paul Martin's Grove Addition lies east of Little and Hoyt's Addition. Through some error in surveying or platting, there is a strip of land 22 feet in width between these two additions not included in either. This omitted strip is the land which gives rise to the present controversy. The greater part of this strip was included within Craighead's fence and the remainder was used as a part of his yard. So far as appears he is the only person asserting title to it. In 1912 the taxing officials discovered that, owing to the error in the survey, this land had not previously been taxed, and assessed against it the taxes now in controversy. Apparently the holder of the original title has never been in actual possession of this strip and is not asserting a right to the possession of it. He is not a party to this action. Whether as against him Craighead has or has not a valid interest in the land, we are of opinion that there was a sufficient basis for Craighead's claim to entitle him to redeem from the tax sales.

Order affirmed.

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FRANK SANTALA v. HJALMAR HILL.<sup>1</sup>

July 18, 1919.

No. 21,259.

**Appeal dismissed — service of notice of appeal defective.**

The appeal from the municipal court to the district court was rightly dismissed because the proof of service of the notice of appeal failed to show a valid service of that notice.

From a judgment of the municipal court of the village of Gilbert in

<sup>1</sup>Reported in 178 N. W. 651.

favor of plaintiff, defendant appealed to the district court for St. Louis county. The appeal was heard by Freeman, J., who granted plaintiff's motion to dismiss the appeal. From the order granting plaintiff's motion to dismiss the appeal, defendant appealed. Affirmed.

*Luke F. Burns and J. H. Peregrine*, for appellant.

*R. E. Anderson*, for respondent.

TAYLOR, C.

Defendant attempted to take an appeal to the district court from a judgment rendered against him by the municipal court of the village of Gilbert. The district court dismissed the appeal on the ground that defendant had failed to make personal service of the notice of appeal as required by the statute. Whether this ruling was correct is the only question presented.

The judgment was entered on August 2, 1918. A notice of appeal dated August 2, 1918, and bearing the following indorsement:

"Service of the within notice of appeal by mailing admitted at Virginia this 2nd day of August, A. D. 1918.

"R. E. Anderson,

"Attorney for plaintiff"

was filed in the office of the clerk of the district court on August 9, 1918. This is all that the record shows in respect to the service of the notice. It is admitted in the briefs, however, that the notice was mailed from Virginia to plaintiff's attorney at Gilbert, that it was placed in his post office box at Gilbert and came into his possession with his other mail, and that he returned the original notice to defendant's attorney with the above admission of service indorsed thereon. Defendant concedes that service by mail was unauthorized and of no effect, but contends that the actual receipt of the notice in the manner stated should be considered as personal service.

Appeals from such municipal courts are governed by the same laws which provide for appeals from justices' courts. G. S. 1913, § 280. To be effective the notice of appeal with proof of service must be filed within the prescribed time, and the proof filed must show a valid service and cannot be amended after the expiration of the statutory time for filing it. *Cremer v. Hartmann*, 34 Minn. 97, 24 N. W. 341; *Stolt v. Chicago, M.*

& St. P. Ry. Co. 49 Minn. 353, 51 N. W. 1103; Graham v. Conrad, 66 Minn. 471, 69 N. W. 334; Spitzhak v. Regenik, 122 Minn. 352, 142 N. W. 709. It follows that unless the admission of service indorsed on the notice of appeal shows a valid service of that notice, that appeal was rightly dismissed. The admission admits service "by mailing." It does not purport to admit personal service. It does not necessarily show that the notice mailed was ever received, and cannot be aided by the subsequent admissions.

Order affirmed.

HALLAM, J. (dissenting).

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CITIZENS STATE BANK OF TWIN VALLEY v. H. L.  
MOEBECK.

OLE HOLT, INTERVENER AND APPELLANT.<sup>1</sup>

July 18, 1919.

No. 21,300.

**Vendor and purchaser — estoppel of buyer as to tillable acreage.**

Where the vendee in a contract for the purchase of a tract of land, undertakes to and does personally examine the same as fully and completely as he chooses, and determines in his own mind the number of acres of tillable land as well as the number of acres of slough thereon, the same never having been measured, and, having communicated his opinion thereof to the seller, who replied thereto that he believed that there were more acres of tillable land, and the vendee then enters into a contract for the purchase of the same, he cannot thereafter be heard to assert that he relied upon the representations of the seller as to the number of acres of tillable land and thereby avoid the contract upon the ground of fraud.

Action in the district court for Clay county to recover \$427.56 for conversion of grain. Ole Holt filed his complaint in intervention. The facts are stated in the opinion. The case was tried before Dancer, J.,

<sup>1</sup>Reported in 173 N. W. 853.

who at the close of the testimony denied plaintiff's motion for a directed verdict, and a jury which answered in the affirmative the question: "Was the contract for deed obtained by M. E. Dahl and H. H. Dahl from the intervener by fraud?" and in the negative the question: "Is the plaintiff a bona fide holder of the promissory note described in the complaint?" and returned a verdict in favor of defendant and intervener. Plaintiff's motion for judgment notwithstanding the verdict was granted. From the judgment entered pursuant to the order for judgment, defendant and intervener appealed. Affirmed.

*Christian G. Dosland*, for appellants.

*F. H. Peterson* and *Oliver Ostensoe*, for respondent.

QUINN, J.

This is an action to recover the value of certain grain alleged to have been converted by the defendant to his own use and to which plaintiff claims title and the right of possession under a certain chattel mortgage executed by the intervener on August 25, 1913. A verdict and special findings were returned by the jury in favor of both the defendant and intervener. Upon a motion the trial court, notwithstanding the verdict, ordered judgment for the plaintiff and against the defendant for the sum of \$414, and against both defendant and intervener for the costs and disbursements. Judgment was so entered and this appeal is from the judgment.

M. E. and H. H. Dahl are brothers. During the times here in question the former was cashier of the plaintiff bank and the latter a merchant in the village of Ulen, a few miles distant from Twin Valley. They owned the 120 acres of land in controversy, the record title to which was in M. E. Dahl. The intervener was a farmer residing upon and operating a farm of 640 acres located about four miles from Ulen and adjoining the 120 acres referred to.

On the day in question the intervener and H. H. Dahl met at the village of Ulen. Dahl proposed to sell the 120 acres to Holt and asked him to go and look it over. Holt, in company with his son 26 years of age, went and viewed the land. During the afternoon Holt returned to Ulen and talked with Dahl as to the amount of tillable land in the tract. They arrived at a bargain and Holt remained in town until Dahl ar-

rived from Twin Valley. The price agreed upon was \$20 per acre, payable as follows: \$400 cash, \$400 November 15, 1914, and \$400 November 15, 1915, with interest at six per cent per annum, when a deed was to be given subject to a mortgage of \$1,200. M. E. Dahl arrived from Twin Valley at about seven o'clock p. m. He then prepared a contract in accordance with the bargain as above indicated, which he and Mr. Holt signed and acknowledged. No mention was made in the contract of the giving of any notes. Holt had no money with which to make the cash payment. He executed a note for \$400 payable to the order of the plaintiff bank on November 15, 1913, with interest at the rate of 10 per cent per annum. To secure the payment of such note he executed a chattel mortgage upon his undivided one-half of 150 acres of wheat and 250 acres of oats then in shock on the farm where he was living. On August 26 the note was turned over to the bank and entered upon its records as bills receivable, and \$400 was placed to the credit of M. E. and H. H. Dahl, subject to check. On August 27, 1913, the mortgage was duly filed for record in the office of the register of deeds of the county.

After threshing the intervener hauled the grain to the defendant's elevator at Ulen. Plaintiff made a demand upon the defendant therefor which was refused, defendant claiming it in payment of a debt. Plaintiff then proceeded to foreclose its mortgage without obtaining possession of the grain. The usual notice of foreclosure sale was given, which provided for the sale of the grain on December 18, 1913, at public auction to the highest bidder. These matters were set forth in the complaint. It is alleged in the complaint that the grain was sold to the plaintiff at such foreclosure sale for the sum of \$427.56 by a constable of the village. Thereafter the plaintiff brought this action against the defendant for the conversion of the grain.

In his answer the defendant admits the incorporation of the plaintiff and alleges that he has not sufficient knowledge or information to form a belief as to the truth of the other allegations of the complaint and therefore denies the same.

Ole Holt, the mortgagor, appeared in the action and filed a complaint in intervention, in which he admits that he made, executed and delivered the promissory note and chattel mortgage mentioned in the complaint to the plaintiff on the twenty-fifth day of August, 1913; al-

leges that the note was given as part payment of the purchase price of the land; admits that the grain mentioned in the complaint was a portion of that raised by him on the premises where he resided; alleges that he was the owner of the same on December 18, 1913, and denies each and every other allegation in plaintiff's complaint contained. He further alleges, upon information and belief, by way of counterclaim, that on August 25, 1913, the plaintiff bank and M. E. Dahl were the owners of the land in controversy, and that on that day he entered into a contract for a deed whereby the plaintiff and M. E. Dahl agreed to sell and convey to him the real estate in question at the agreed price of \$2,400, payable as follows: \$400 cash, \$400 November 15, 1914, and \$400 November 15, 1915, with interest at the rate of 6 per cent per annum, and the assumption of the mortgage of \$1,200 thereon; that at the time of the making of said contract he executed and delivered to the plaintiff his promissory note for \$400, which note represents the first payment to be made on the land as mentioned in said contract, together with the chattel mortgage; that at the same time he executed to plaintiff two other promissory notes for \$400, payable November 15, 1914, and November 15, 1915; that the plaintiff and the said M. E. Dahl, on the twenty-fifth day of August, 1913, for the purpose of cheating and defrauding the intervener, fraudulently represented and stated to him that said real estate was of the fair and reasonable value of \$20 per acre; that all of said land could be broke with the exception of 40 acres; that that balance was good pasture land; that unless the intervener purchased said premises immediately he would lose the opportunity, for the reason that others were anxious to purchase the same; that such representations were false; that the said M. E. Dahl made such representations knowing them to be false and with the intention of cheating and defrauding said intervener; that, believing and relying upon such statements, intervener signed said contract; that intervener has not performed any of the terms or conditions of the contract, for the reason that he discovered shortly after it was signed that plaintiff and M. E. Dahl had defrauded him, and that plaintiff is not a bona fide holder of said note and did not obtain the same in the ordinary course of business.

The case was twice tried in the court below by able counsel. Un-

doubtedly the parties have offered all of the testimony which they had in support of the various contentions. The learned trial judge, notwithstanding the findings of the jury, ordered judgment in favor of the plaintiff and against the defendant, placing the order squarely upon the proposition that the testimony failed to establish any misrepresentations which the vendee in the land transaction had a right to rely upon as a basis for a charge of fraud.

We are of the opinion that the conclusion arrived at by the trial court was the correct one. In his pleading the intervenor alleges that the plaintiff and M. E. Dahl were the owners of the 120 acres of land in question, and that the statements and representations complained of were made to him by M. E. Dahl. But, aside from all technicalities, it clearly appears that the intervenor dealt entirely with H. H. Dahl so far as arriving at a bargain for the purchase of the land is concerned. Mr. Holt is a man of mature years, has been a farmer for upwards of 16 years and has resided upon a farm adjoining the premises in question for two years. After the purchase of the land was suggested to him he went, in company with his son, a young man of 26 years, and looked the place over with a view to purchasing. The grain thereon was then in shock and the hay in stacks. He testified that the grass in the slough was above his head, and that Dahl told him it would make good pasture. It is further alleged in his pleading that he is of Scandinavian birth, and does not understand the English language well, but it does not appear whether Mr. Dahl was familiar with the Scandinavian language.

It is insisted on behalf of the intervenor that after looking over the land he was of the opinion that there were only about 60 acres of tillable land in the tract. He so stated to Mr. Dahl in their conversation, and Mr. Dahl told him that he thought there were between 80 and 90. It is clear from the testimony that Mr. Holt understood that the tillable land had never been measured and that Mr. Dahl's statement, like his own, was a mere estimate. He does not particularly complain of the number of acres in the slough, but says that it was wetter than he was given to understand. These are the reasons which he gives for refusing to carry out his contract, claiming that on account of the difference in the acreage of tillable land and its condition as to being wet,



the entire tract was worth \$8 per acre less than it would have been had it been as represented. He testified repeatedly, both upon direct and cross examination, that he knew Mr. Dahl's statement as to the number of acres of tillable land was a mere guess, that is, an estimate, and that he knew Mr. Dahl had never had the same surveyed. This testimony, when taken into consideration in connection with the testimony as to the number of acres of tillable land at the time of the trial, which was a mere estimate by the witnesses upon both sides, we think insufficient to support the contention of the intervener as to the question of fraud.

The intervener testified in effect that, when he left Ulen on August 25 to see the land, he first returned to his home and had his dinner; that he and his son then went and looked the land over; that in so doing he walked from the southwest to the northwest corner thereof along the west line and then returned about 30 or 40 rods east of the west line over the stubble and mowed ground; that there were about 30 acres of grain and about the same amount of hay land that had been cut over; that he could see the water about ten rods distant out in the slough in the tall grass; that he thought there were about 40 acres in the slough, but the grass was so tall he could not tell very well, and that he was in a hurry and there was so much water that he could not go around the slough so as to see how many acres there were; that the slough was not bigger, but wetter and more swampy, than he thought it was. He had a full and complete opportunity to see what the land and its condition were. He saw the slough, the tall grass, the water therein at a distance of ten rods, and the stony portion of the land. He could not cross the outlet without getting wet, and there was so much water he could not walk around the slough in his hurry. He had lived within a half mile of the land for two years and was familiar with farm lands in that vicinity. Such a showing, coming direct from the purchaser's own testimony, does not make a case upon which to predicate a charge of fraud. There is no showing that any artifice was practiced on the part of H. H. Dahl to in any manner prevent the intervener from making a full and complete investigation of the situation. Knowing and seeing what he did, the intervener had no right to lay aside all the information which he had obtained and rely entirely upon the mere

statement of the seller that he thought there were between 80 and 90 acres of breakable land in the tract.

The intervener alleges in his pleading that he gave the note of \$400 and the chattel mortgage to the plaintiff to evidence and secure the first payment mentioned in the land contract, and upon the trial testified that he did not remember that anything was said about his obtaining the money from the bank with which to make the cash payment, while both M. E. and H. H. Dahl testified positively that such was the talk and arrangement. Under the issue as made by the pleadings, and in the absence of a showing of fraud in connection with the land transaction, the question as to the bank's claim that it was a bona fide purchaser of the note, is unimportant. Of course, if the note and chattel mortgage were given for money furnished Holt to make cash payment on the purchase of the land, that ends the case in plaintiff's favor. The jury were so charged. In his pleading the intervener alleged that he executed the note and mortgage to plaintiff. His testimony indicates that he supposed the instruments ran to M. E. Dahl, and not to the bank. The bank either made a loan to the intervener or else the note and mortgage were taken in its name for the convenience of Dahl. There was no indorsement or assignment to the bank, and the question of bona fide holder does not arise. But, assuming the transaction of the note and chattel mortgage to have been Dahl's and not the bank's except in name, still the cancelation of the land contract does not furnish any defense or ground for relief against plaintiff's claim. The chattel mortgage was foreclosed before the cancelation and while the contract was in force. The amount realized on the foreclosure the law applies upon the debt, the note. While an unsatisfied judgment for an instalment on an executory land contract will be discharged of record if the contract is terminated by the vendor, instalments paid may not be recovered. *Warren v. Ward*, 91 Minn. 254, 97 N. W. 886. The foreclosure amounted to a payment while the contract was in force, *Clark v. Gaar, Scott & Co.* 78 Minn. 492, 81 N. W. 530, and we see no way in which the termination by Dahl of the contract in question can avail as a defense for the defendant herein, or as a ground for relief to the intervener.

The order is affirmed.

IN THE MATTER OF THE ESTATE OF KATE LITTLE, DE-  
CEASED.

DUNCAN D. LITTLE AND ANOTHER v. UNIVERSALIST  
CONVENTION OF MINNESOTA.<sup>1</sup>

July 18, 1919.

No. 21,308.

**Will — construction of devise to religious corporation.**

The will of testatrix clearly discloses an intention that the religious corporation representing her faith should dispose of the bulk of her property for benevolent and religious purposes, in accordance with the practice of such corporation. It is *held* that the devise should be construed as absolute to the corporation and not in trust, although words importing a trust are used in the will. The direction that the property, consisting mainly of a valuable 160 acre farm, be sold and converted into a fund, only the income of which should be used for benevolent and religious purposes, merely follows the by-laws and practice of the corporation and does not indicate a trust. Nor does the fact that one acre of the farm, the burial plot of herself and her father, is never to be sold, and that a part of the income from the fund is to be devoted to the care of the graves, compel the conclusion that the will proposes the creation of an illegal trust, the corporation being empowered to take gifts of burial places, and there being nothing in the will restricting the corporation from permitting other interments in the acre mentioned.

William P. Roberts, as administrator with the will annexed of Kate Little, deceased, made application to the probate court for Fillmore county for the assignment of the residue of the estate according to law. Duncan D. Little and Albert M. Little petitioned the court to assign the residue of the estate to them as next of kin and sole heirs at law of decedent, and not according to the terms of the will, for the reason that the attempted testamentary disposition was null and void. The matter was heard by Michener, J., who made findings that the Universalist Convention of Minnesota was entitled to the estate belonging to

<sup>1</sup>Reported in 173 N. W. 659.

decedent. From the judgment of the probate court the heirs appealed to the district court, where the appeal was heard by Catherwood, J., who affirmed the order of the probate court. From the judgment entered pursuant to the order for judgment, the heirs appealed. Affirmed.

*Hopp & Larson and Gray & Thompson*, for appellants.

*Horace W. Roberts*, for respondent.

HOLT, J.

This appeal involves the validity of the will of Kate Little, deceased. The district court on appeal affirmed the probate court's distribution of the estate according to the terms of the will, and the heirs appeal.

The father of testatrix owned a 160 acre farm at the time of his death. It was located near Preston, this state, and had been his homestead for many years. He was buried on the farm. Testatrix, his sole heir, inherited the homestead. In 1890 she made her will. She died in 1916. She had never married, and left no nearer blood relatives than first cousins. Two of these and the children of a deceased first cousin are the appellants. The portions of the will here material may be thus stated:

"First. After all of my just and lawful debts and all of the expenses of my last sickness and of my funeral and all expenses of the administration of my estate are paid, I give, devise and bequeath in trust to 'The State Convention of Universalists of the State of Minnesota,' all of the property and estate, real, personal and mixed, of which I shall die seized, upon the following terms and conditions and for the following purposes, to wit:

"Second. I direct and strictly enjoin my said devisee, and legatee forever to have charge and control of my father Duncan M. Little's grave and the acre of ground in which said grave is situated, to care for and keep said grave forever supplied with a suitable and proper monument and to care for and keep said grave and the said acre of land in which said grave is situated in a neat, orderly, clean and proper condition and properly inclosed with a fence or fences or such other and proper protection as my said devisee and legatee may deem best and proper, forever, respectively \* \* \*

"Third. I also direct that when dead my remains be interred in said

acre of land by the side of my father and that my grave be kept, cared for and in all things provided for the same as herein provided and directed for in respect to his grave."

The fourth provision relates to a desire that the farm be not disposed of for at least 10 or 20 years after her death.

The fifth describes the farm, locates the acre upon which is the father's grave, and continues: "I also direct that my father's grave and mine be kept constantly inclosed with a fence so that fowls cannot pass through it and that no stock or animals be permitted to pasture or run upon said acre, and I also strictly direct that said acre shall never be sold or disposed of but shall be kept forever and cared for and for the purposes herein provided for. \* \* \*"

The sixth: "I direct that all of the income and profit arising from the estate of which I may die seized after payment of my debts, expenses of last sickness and as hereinbefore provided, be used and expended by my said devisee and legatee in the keeping and caring for the grave of my father and of myself and said acre as hereinbefore provided or so much thereof as may be necessary, the balance of said income and profit to be used and expended by my said devisee and legatee as it may deem best providing it be used for some worthy Christian and charitable purposes but I prefer if possible that such surplus of profits and income be used to pay upon or help defray the salary or compensation of the minister who may be located and preach in the locality where said graves are located and in whose charge as such minister the same may be for all time. Said minister to be of the Universalist denomination."

The seventh directs that the devisee nominate the executor and trustee under the will, and that such nominee properly qualifies and gives security for the faithful performance of the duties as executor and trustee, and that if the devisee can lawfully act as such that it be appointed "giving proper security as such," and directs and confers full power upon such executor and trustee, under the advice of the devisee, to sell and dispose of all of her estate "except the said acre and graves thereon which shall never be sold;" and also directs the "devisee and legatee to see that my estate is so disposed of and invested to constantly realize the greatest income possible."

Courts aim to carry out the intentions of a testator, and are always inclined to give a construction that will sustain the validity of his gifts. Often those who draft wills are unfamiliar with legal terms or have confused or inaccurate conception of their meaning, hence the whole document must be considered in ascertaining the particular value that the testator placed on certain words or phrases therein.

From a perusal of the will before us it is evident that the main purpose of testatrix was to devote her property to the charitable use of her church, after providing for the proper care of the burial place of her father and herself. If her wishes as to the sale of the farm are heeded, no doubt a considerable fund will be realized, so that but a trifling amount of the income therefrom will suffice to care for the graves, and quite a sum will be available for the intended charities. Taking this evident purpose into consideration, is it permissible to construe the language of the will as a devise to respondent direct and not in trust, for, if it be in trust, invalidity is conceded? The words are: "I give, devise and bequeath in trust to" the respondent all the property upon the terms and conditions stated. Weight may be given to the fact that respondent is a religious corporation empowered by statute to take property by gift. G. S. 1913, § 6622. It was organized for religious, educational, benevolent and missionary purposes. Its by-laws provide that any money or property given to it shall be invested and kept invested according to the gift and kept at all times separate from its general funds, and the income only from such invested funds shall be carried to and used as a part of the general funds if so indicated by the donor. And, at least since 1875, the practice of respondent has been to maintain funds that have been given it intact and make use only of the income thereof. It is clear that the terms and conditions annexed to the gift are but an attempted embodiment in the will of the by-laws and practice mentioned which, no doubt, were well known to testatrix. Apart from the small sum needed to care for the burial plot, respondent is not required to spend the income from the fund or estate for any particular person or object. At most, a desire is expressed as to the expenditures. It is really a gift or devise to respondent direct, to be used according to its known general practice. The use of the words "in trust" in the first part of the will, and the directions as to the giving

of security in the last part, should be attributed to hazy notions of legal terms and requirements.

The condition annexed to the devise of the burial acre is that it shall never be sold. Respondent is authorized to acquire burial grounds by devise. G. S. 1913, § 6600. While perhaps, what are commonly known as denominational or church cemeteries are thereby referred to, it does not, we think, exclude the family burial plot that a person might desire to confide to his church organization, nor are there any restrictions in the will against interment of others in the acre, if respondent deems fit, thus making it a cemetery for the few of its adherents residing in the vicinity. The law against suspending the power of alienation is hardly applicable to the plot of ground wherein rest the dead. At least, the space actually occupied by the grave is not a matter of barter and sale. *Hines v. State*, 126 Tenn. 1, 149 S. W. 1058, 42 L.R.A.(N.S.) 1138. In *Diocese of St. Paul v. City of St. Paul*, 138 Minn. 67, 163 N. W. 978, Mr. Justice Bunn states: "It would be unthinkable that land actually in use for burial purposes should or could be sold."

Our conclusion is that the will may be construed as a direct devise to respondent, and as such it should be sustained.

Affirmed.

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## HENRY RECHTZIGEL v. NATIONAL CASUALTY COMPANY.<sup>1</sup>

July 18, 1919.

No. 21,314.

### Accident insurance — release — verdict sustained by evidence.

1. Upon a consideration of the evidence, it is *held* that it sustains a verdict in plaintiff's favor in an action on a policy of accident insurance as against a defense based on an alleged settlement and release of his claim for indemnity. The general rule applied in determining whether a verdict is sustained by the evidence extends to cases where an alleged fact must be established by a preponderance of clear and convincing evidence.

### Same — provision in policy inapplicable in case of settlement.

2. A provision of the policy requiring the insured to furnish phys-

<sup>1</sup>Reported in 173 N. W. 670.

cians' reports as a condition precedent to the maintenance of an action thereon, has no application where the insurer asserts that it has made settlement in full and is released from further liability.

**Same — total disability — care of physician.**

3. By the terms of the policy here involved, the insured was entitled to indemnity for total disability caused by accident, if he was under the care of a physician during the period of disability, even though there was no medical treatment of his injury.

**Same — right of insured not contingent after happening of accident.**

4. The liability of the insurer became absolute when the accident occurred and the right to indemnity, payable in future instalments, was not contingent upon the payment of premiums falling due after the date of the accident.

**Pleading — departure.**

5. A reply denying that settlement of all claims under the policy had been made, and alleging that, if a release of the claim of the insured was given, it was procured by the fraud of an agent of the insurer, is not a departure from the complaint, which alleged that no payment of the claim had been made.

**Charge to jury — admission of evidence.**

6. Alleged errors in the court's instructions to the jury and in rulings on the admission of evidence were without prejudice to appellant.

Action in the district court for Ramsey county to recover \$1,340 upon an accident insurance policy. The facts are stated in the opinion. The case was tried before Dickson, J., who when plaintiff rested denied defendant's motion to dismiss the action and at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for \$1,500.80. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. *Affirmed.*

*Ricks & Hamrum*, for appellant.

*John J. Keefe*, for respondent.

**LEES, C.**

Action to recover on an accident insurance policy in which plaintiff had a verdict, and defendant appeals from an order denying its alter-



native motion for judgment notwithstanding the verdict, or for a new trial.

Plaintiff was a carpenter and was injured by a falling timber on October 10, 1914. Under the policy he was entitled to \$60 per month for not more than 24 consecutive months while wholly disabled from performing every duty of any business or occupation. He sued to recover \$1,440 less \$100 which had been paid him under circumstances presently to be related. The injuries, which were principally to his right leg, were first treated by Dr. Benepe and later by Dr. Hilger of St. Paul. He was in a hospital for treatment for about two weeks and then went to his home in St. Paul. On October 21, 1914, Dr. Benepe made a written report to the company, in which he stated that plaintiff would be able to attend to his duties in three or four weeks if no complications arose. In the month of November, 1914, plaintiff signed a proposal for a settlement in full of all claims against the company in consideration of the payment to him of \$100. The proposal was originally dated November 17. Later on the date was changed to November 24, when the company gave him a check for \$100, which he indorsed and cashed on the same day. Printed on the face of the check was a statement that by receiving and indorsing it the payee made "a full compromise settlement and release \* \* \* of any and all claims" under the policy. The principal defense was that plaintiff's claim had been thus released. The answer pleaded the release as a bar to the action. In his reply, plaintiff alleged that he was induced to sign the proposal because defendant's agent falsely and fraudulently stated to him that it was merely a receipt for the \$100 check, and that he was ignorant of its actual terms.

The testimony given by plaintiff and by Dr. Hilger was sufficient to establish total disability, as defined in the policy, due to the injuries received on October 10, and that such disability continued for 24 months thereafter. Plaintiff was, therefore, justly entitled to the maximum benefits provided for in the policy, unless his claim thereto was defeated by his acts or omissions subsequent to the date of his injury. That it has been so defeated is the contention of defendant's counsel, who, with earnestness and vigor, attack his right to recover upon the following grounds:

1. The court instructed the jury that plaintiff could not recover, unless he proved that he was led to sign the proposal and accept and indorse the check by reason of the fraud pleaded in the reply, and that he must establish the existence of the alleged fraud "by a fair preponderance of the clear and convincing evidence in the case." The sufficiency of the evidence to justify the jury in finding in plaintiff's favor on this issue under the instructions of the court is strenuously attacked.

We have inspected the original exhibits which defendant put in evidence and caused to be returned to this court. It appears therefrom that Dr. Benepe, in his report of October 21, stated that plaintiff had been totally disabled by reason of a fractured rib and a bruised knee, was confined to his bed eight days, had been up two days, and, if no complications arose, would be able to attend to his duties in three or four weeks. Four witnesses testified for defendant that, after this report was sent in, plaintiff sought to obtain a settlement of his claim in full without solicitation on the part of anyone representing defendant, and that no false statements were made and no deception was practiced in getting his signature to the proposal or his indorsement on the check. Plaintiff was alone in testifying to the perpetration of the alleged fraud upon him. There were some discrepancies in his testimony. Stress is laid on the report of his physician, which indicated that his injuries were much less severe than they subsequently proved to be. If they were no more serious than the doctor reported, \$100 would fairly represent the amount plaintiff would be entitled to claim under the policy.

On the other hand, we are asked to consider the actual extent of plaintiff's injuries, the disability attendant upon them, and the inadequacy of the sum paid in settlement to compensate him therefor as his policy provided. We are also invited to consider plaintiff's testimony that he went to the office of defendant's agent in December and January to get the money which he claimed was due him for those months, and his employment of his present attorney early in February to enforce payment of his claim. It is argued that these acts, closely following the alleged settlement, indicate that plaintiff did not know that he had signed away his right to claim further benefits under the policy.

After giving careful consideration to the points made in the briefs and arguments, we have concluded that there was sufficient evidence to

sustain a finding adverse to defendant upon the issue now under consideration. The general rule by which appellate courts are governed in passing upon the sufficiency of the evidence to justify a verdict or finding is clearly stated in *Maroney v. Minneapolis & St. L. R. Co.* 123 Minn. 480, 144 N. W. 149, 49 L.R.A.(N.S.) 756. It applies to cases like this where plaintiff is bound to establish his claim, not by a mere preponderance of evidence, but by a preponderance of clear and convincing evidence. *Oertel v. Pierce*, 116 Minn. 266, 133 N. W. 797, Ann. Cas. 1913A, 854.

2. The policy provides that as a condition precedent to a recovery, the assured must "furnish the company, every thirty days, with a report from the attending physician," and that indemnity will be paid only for the time he is under the care and regular attendance of a legally qualified physician. No physician's reports were furnished after the alleged settlement was made. But since it was made defendant has asserted and still asserts that plaintiff has no right to further benefits. It stands upon the release, hence it would have been useless to furnish reports after November 24, 1914, and plaintiff was not bound to furnish them in order to maintain this action. The law as to this is well settled. *Zeitler v. National Casualty Co.* 124 Minn. 478, 145 N. W. 395; *Dechter v. National Council K. & L. of S.* 130 Minn. 329, 153 N. W. 742, Ann. Cas. 1917C, 142; *Knickerbocker Ins. Co. v. Pendleton*, 112 U. S. 696, 710, 5 Sup. Ct. 314, 28 L. ed. 866.

3. The evidence fairly tends to show that plaintiff was under the care and attendance of qualified physicians for two years after he was injured. It is true that there was no medical treatment of his injuries during the greater portion of that time. He was advised to wear and did wear a steel brace on his injured leg. Dr. Hilger testified that the knee would bend in and out instead of only forward as a normal knee should; that the ligaments were ruptured and only an operation or the wearing of a brace would help to restore the knee to its former state of efficiency. In many cases the very purpose for which accident insurance is written would be defeated if there could be no recovery for an injury which did not require the regular attendance of and treatment by a physician. The policy before us does not warrant such a construction. It specifically provides for indemnity against total loss of

time not exceeding 24 consecutive months resulting from bodily injuries directly caused through external, violent and accidental means, which wholly disable the assured from performing every duty of any occupation. The clause in the policy relating to payments during the time the assured was under the care of a physician, must be read in connection with this specific provision for indemnity.

4. The payment in advance of quarterly premiums of \$6.60 was required to keep the policy in force. No premiums were paid after April 4, 1915. The policy did not lapse for that reason. The liability of defendant became absolute upon the occurrence of the accident, and payment of indemnity for the injuries then sustained was not contingent upon future payment of premiums. *Burkheiser v. Mutual Acc. Assn.* 61 Fed. 816, 26 L.R.A. 112; *Railway Mail Assn. v. Dent*, 213 Fed. 981, 130 C. C. A. 387, L.R.A. 1915A, 314.

*Zeitler v. Nat. Casualty Co.* supra, is not authority to the contrary, but tends rather to sustain the rule above stated.

5. The answer pleads the settlement and release. The reply denies the settlement, admits that plaintiff signed the release, and alleges that it was signed as a result of the fraud of defendant's agent. The point is made that the reply is a departure from the complaint. The point is not well taken. *Finn v. Modern Brotherhood of America*, 118 Minn. 307, 136 N. W. 850.

6. One of the assignments of error goes to the giving of the following instruction: "As a matter of fact, they [the company] are legally liable to pay under that policy every thirty days." Without stopping to consider whether this was a correct interpretation of the policy, we hold that; even if it was erroneous, no prejudice resulted because plaintiff waited until the full period of 24 months covered by the policy had elapsed before bringing this action. It was, therefore, immaterial whether defendant could or could not have been made to pay the indemnity in monthly instalments.

7. The assignments of error relating to rulings on the admission of evidence over defendant's objections have not been overlooked, but we are unable to see wherein it was prejudiced by any of the rulings complained of.

Order affirmed.

T. B. FLANERY v. ROSA KUSHA, ALSO KNOWN AS MRS.  
JOHN KUSHA.<sup>1</sup>

July 18, 1919.

No. 21,326.

**Judgment — jurisdiction of court — defective summons.**

1. In an action commenced in the district court, the summons and complaint were served on defendant personally. The summons required her to serve her answer to the complaint "within twenty or \* \* \* after service of this summons upon you." She failed to answer and a default judgment was entered against her. *Held* that, notwithstanding the defect in the summons, the court acquired jurisdiction to enter the judgment.

**Process — summons — liberal construction of statute.**

2. A summons is not process, but merely a notice to defendant that an action against him has been commenced and that judgment will be taken against him if he fails to answer. It is sufficient if it clearly informs him that it is intended for him and requires him to answer the complaint. The statute prescribing its requisites is to be liberally construed, there being no general rule as to what defects are jurisdictional.

Defendant, appearing specially for that purpose, in November, 1918, moved the district court for Hennepin county to set aside a default judgment entered against her in 1916. The facts are stated in the opinion. From an order denying her motion, Rockwood, J., defendant appealed. Affirmed.

*C. C. Joslyn*, for appellant.

*John A. Larimore*, for respondent.

LEES, C.

Appeal from an order denying defendant's application for the vacation of a default judgment entered against her. The application was made on the ground that the court had not acquired jurisdiction over defendant.

<sup>1</sup>Reported in 173 N. W. 652.

On December 29, 1915, a summons was issued in the usual form except in one particular. It notified defendant that she must serve a copy of her answer to the complaint which was attached to the summons within "twenty or \* \* \* after service of this summons upon you." The name and address of plaintiff's attorney upon whom the answer was to be served were given, and defendant was notified that if she failed "to answer the said complaint within the time aforesaid the plaintiff in this action will take judgment against you for the sum of one hundred six and no/100 (\$106.00)" with interest and costs. Personal service of the summons and complaint was made on March 16, 1916, as defendant was about to leave this state to go to Chicago, where she has since resided. She made no answer, and proof of service of the summons and complaint being filed, together with proof of her default, judgment was entered against her on May 8, 1916. An execution was issued on September 6, 1916, and a levy on land in which she had an interest was made, followed, on November 13, 1916, by an execution sale thereof to plaintiff. On September 22, 1917, plaintiff assigned the sheriff's certificate of sale to third parties, who now claim title to the land, there having been no redemption from the sale.

Section 7729, G. S. 1913, prescribes the requisites of a summons. In part, the section reads as follows:

"The summons shall \* \* \* require him (defendant) to serve his answer to the complaint \* \* \* within twenty days after the service on him of such summons exclusive of the day of service."

The defect in this summons consists in the omission of the word "days" after the word "twenty."

The sole question before us is whether the court failed to acquire jurisdiction because of this defect. We answer the question in the negative and will briefly state our reasons for so answering it.

A summons is not process, but merely a notice to defendant that an action against him has been commenced and that judgment will be taken against him if he fails to answer. *Hanna v. Russell*, 12 Minn. 43 (80); *First Nat. Bank of Whitewater v. Estenson*, 68 Minn. 28, 70 N. W. 775; *Morrison County Lumber Co. v. Duclos*, 131 Minn. 173, 154 N. W. 952. The statute does not prescribe the form of a summons. It is sufficient in this regard if it clearly informs the defendant that it is

intended for him and requires him to answer the complaint. *Plano Mnfg. Co. v. Kaufert*, 86 Minn. 13, 89 N. W. 1124. The statute prescribing its requisites is to be liberally construed, there being no general rule as to what defects are jurisdictional. *Lockway v. Modern Woodmen*, 116 Minn. 115, 133 N. W. 398, Ann. Cas. 1913A, 555.

The effect of an omission in a summons such as we have here has not heretofore been considered by this court. *Lockway v. Modern Woodmen*, supra, comes nearest to being in point. The summons in that case required defendant to answer within 20 days instead of 30, to which it was entitled by the statute applicable to the class to which defendant belonged. The statute further provided that the service of the summons requiring an answer to be filed within less than 30 days after such service should not be valid or binding. Nevertheless it was held that the summons might be amended to conform to the statute and that defendant's motion to vacate the service was properly denied. It was said in passing that, if the summons had required defendant to answer within a less number of days than 20, the mistake would be a mere irregularity and subject to amendment. It is but a short step from this holding to the one in the case at bar. If a summons requiring defendant to answer in less than 20 days after its service gives the court jurisdiction over him, one which required him to answer, without stating when, must likewise give jurisdiction.

Read in connection with the complaint served with it, the summons in this case notified defendant that she had been sued by plaintiff in the district court of Hennepin county; that, if she did not answer the complaint by serving a copy of her answer on plaintiff's attorney at his office in Minneapolis, judgment would be taken against her for \$106 with interest and costs, and that her answer must be served "within twenty or \* \* \* after service of this summons." Counsel for defendant forcibly contends that "twenty" may refer to any known division of time, such as hours, days, weeks or months, and that there is nothing to advise defendant—an illiterate woman of foreign birth—that 20 days were intended. On the other hand counsel for plaintiff refer to the rule that everyone is presumed to know the law and that the statute allows a defendant 20 days after service of a district court summons upon him within which to appear and answer. We do not

deem either contention to be of controlling importance, basing our decision upon the holding that the omission of the word "days" did not destroy the validity of the summons and that such an omission was an irregularity only, so that the court obtained jurisdiction over the defendant and its judgment against her was not void.

We have not overlooked the cases cited by counsel for defendant. All of them are from other states. Some of them sustain the contention that this summons was fatally defective. *Gundry v. Whittlesey*, 19 Wis. 227, is perhaps the strongest case in defendant's favor. The Wisconsin statute required the summons to specify the amount for which judgment would be taken in case of failure to answer. The summons notified defendant that if he failed to answer plaintiff would take judgment against him for "two hundred and fifty \* \* \* with ten per cent interest." Omission of the word "dollars" was held to be fatal to the validity of the summons. The complaint was not served and, of course defendant could only surmise that plaintiff was asking for a judgment of \$250. There is a material difference in the nature of the omission in the summons in that case and the omission involved in this case. We find nothing in the other cases cited tending to weaken the force of the decisions heretofore rendered by this court, to which we have called attention and which in our judgment necessarily lead to the conclusion we have reached here.

Order affirmed.

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GEORGE A. GERMAIN v. GREAT NORTHERN LUMBER  
COMPANY AND ANOTHER.

GREAT NORTHERN LUMBER COMPANY, APPELLANT.<sup>1</sup>

July 18, 1919.

No. 21,833.

**Appeal and error — reversal.**

1. This court will never reverse a case for rejection of an answer to a question, unless it is made to appear that the answer would be material and favorable to the appellant.

<sup>1</sup>Reported in 173 N. W. 667.



**Promise to pay debt of another — parol evidence inadmissible.**

2. In an action on a promise of a vendee, embodied in a written bill of sale, to pay a debt owing by the vendor to plaintiff, the written promise cannot be varied by parol.

**No allegation of fraud or mistake of fact.**

3. There is no pleading that the promise made by the vendee in this case was procured by fraud or under mistake of fact, nor is the evidence sufficient to make out such a defense.

**Measure of damages.**

4. The measure of recovery is, not the consideration stated in the bill of sale, but the amount of the debt of plaintiff.

Action in the district court for Hennepin county to recover \$1,092.90 upon a contract. The case was tried before Jelley, J., who when plaintiff rested and at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for \$1,123.88 against the lumber company. From an order denying its motion for a new trial, defendant appealed. Affirmed.

*Rose & Brill*, for appellant.

*Selover, Schultz & Selover*, for respondent.

**HALLAM, J.**

On June 14, 1916, plaintiff sold to C. R. Girton, doing business as the Industrial Lumber Company, a motor truck for the price of \$1,500 to be paid in lumber. In the agreement of sale the Industrial Lumber Company was described as a corporation, but there was no such corporation. Girton never paid any part of the price. On September 16, 1916, Girton, Samuel Fleisher and J. E. Brill entered into an agreement for the formation of a corporation, to be known as the Industrial Lumber Company "the object and purpose being to wind up the business of C. R. Girton and transfer the same to the new corporation as soon as may be."

On January 29, 1917, the same parties entered into another agreement which recited that they had "heretofore had certain oral and written agreements, all with reference to a certain lumber company known as the Industrial Lumber Company and then changed to the Great Northern Lumber Company," and therein they canceled former agree-

ments and merged them into a new one. This agreement provided for the transfer of certain property by Girton to the new corporation and the assumption of certain of Girton's debts. This automobile truck was not mentioned.

On June 6, 1917, Girton gave defendants a bill of sale of this truck. Fleisher, the president and general manager, sent Girton to the office of the defendant's attorney to "make up" the bill of sale. The bill of sale was prepared by defendant's attorney. Defendant produced it on the trial and offered it in evidence. The bill of sale contained this language: "Purchase price was paid direct by the Great Northern Lumber Company in lumber to George Germain, the party who sold said truck to C. R. Girton and who was not paid by C. R. Girton except as herein specified." About \$500 of the purchase price had been paid on May 4, 1917, by a shipment of lumber by defendant on the order of the plaintiff. There is also some evidence that defendant's president and general manager admitted that defendant promised Girton to pay plaintiff the purchase price of the truck and defendant's books of account contain a reference to the transaction, mentioning the truck, the name of plaintiff, and containing the notation "to be paid for in lumber."

This action is brought on the promise of defendant made to Girton to pay plaintiff the price of the truck. No question is raised as to the sufficiency of the evidence to establish such a promise.

1, 2. Defendant's counsel asked Fleisher this question: "Did you ever tell Mr. Girton that you would assume his obligation with Germain?" The court sustained objection to this question. The bill of sale was then in evidence and the court stated as a reason for his ruling that the contract between Girton and defendant was in writing and that "the contract speaks for itself." For two reasons this ruling was not reversible error. First, there is in the record no offer of proof, nothing to indicate what the answer of the witness would be. Perhaps it would not have been favorable to defendant. This court will never reverse a case for rejection of an answer to a question unless it is made to appear that the answer would be material and favorable to the appellant. *Scofield v. Walrath*, 35 Minn. 356, 28 N. W. 926; *Knatvold v. Wilkinson*, 83 Minn. 265, 86 N. W. 99. Second, the promise of defendant was embodied in the written bill of sale delivered to and accepted by defendant.

The peculiar language of the bill of sale was probably sufficient to constitute an agreement by defendant to assume Girton's obligation. In an action by plaintiff on this agreement defendant cannot contradict it by parol. *Sayre v. Burdick*, 47 Minn. 367, 50 N. W. 245; *Lawton v. St. Paul Permanent Loan Co.* 56 Minn. 353, 57 N. W. 1061; *Current v. Muir*, 99 Minn. 1, 108 N. W. 870.

3. Defendant contends that such an instrument could not bar the appellant from showing mistake or fraud, and if it appeared that on the date of the bill of sale, unknown to defendant, Girton had overdrawn his account, this fact would be a valid defense. We are not prepared to say that such facts would not constitute a valid defense. But no such defense was pleaded. Nor did the question which was ruled out tend to elicit any such evidence. Nor is there in the case evidence sufficient to make out such a defense.

4. Defendant complains that the court instructed the jury that the verdict, if for plaintiff, should be for the balance of the purchase price due plaintiff. This was right. If defendant made any promise at all it was the purchase price of the truck. The bill of sale from Girton to defendant recites a consideration of \$1,000. This fact is immaterial. There is no evidence of any promise to pay this amount to plaintiff.

Order affirmed.

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STATE v. SAM H. RICHMAN.<sup>1</sup>

July 18, 1919.

No. 21,343.

**Grand larceny — charge to jury.**

1. The instructions to the jury in a prosecution for grand larceny to the effect that, if the jury found from the evidence that certain money taken from defendant at the time of his arrest was the identical money that had been stolen from complainant, they should consider with the other evidence in the case the failure of defendant to become a witness in his own behalf and explain away such possession, held a violation of section 8376, G. S. 1913, and prejudicial error.

<sup>1</sup>Reported in 173 N. W. 718.

**Same — unexplained possession of stolen property.**

2. The court may, in such case, state to the jury the general rule that the unexplained possession of stolen property is presumptive evidence that the person so in possession stole the same, but cannot, in the face of the statute, go farther and expressly direct the jury to consider the failure of defendant to take the witness stand in support of his defense and explain his possession of the stolen property.

Defendant was indicted by the grand jury of Blue Earth county charged with the crime of grand larceny in the second degree, tried in the district court for that county before Comstock, J., and a jury which returned a verdict of guilty as charged in the indictment. From an order denying his motion for a new trial, defendant appealed. Reversed.

*William J. Quinn* and *John Temple*, for appellant.

*Clifford L. Hilton*, Attorney General, *James E. Markham*, Assistant Attorney General, and *Charles E. Phillips*, County Attorney, for respondent.

**BROWN, C. J.**

Defendant was convicted of the crime of grand larceny and appealed from an order denying a new trial.

The indictment charged defendant with stealing from complainant on the date therein stated the sum of \$145, lawful money of the United States. The evidence tended to show that the money was taken from the person of complainant, and consisted in three twenty, five ten, and seven five dollars bills. It also tended to show that when arrested, some 24 hours after the theft had been committed, defendant had in his possession the sum of \$145 in bills of the same denominations as those stolen from complainant, and which complainant identified on the trial as the stolen money; the identification being founded on the general appearance and the denomination of the several bills, all of which corresponded to the money complainant had lost. Defendant had, at the same time, other money in other pockets of his clothing, but not mingled with that in question. There was also evidence tending to show the manner in which the money was taken from complainant, and therefrom it appears that complainant was a passenger on a train arriving at Mankato, the place where the crime was committed, and as he

was leaving the train at that station some one, subsequently identified by complainant as defendant, jostled or violently pushed him against a seat in the aisle of the car where he was held momentarily, the intruder presently making his way to the rear of the car. The stolen money was at that time in a wallet and carried in the hip pants pocket of complainant, from whence the state claims it was then taken by defendant.

The defense interposed was an alibi, supported by the testimony of two or three witnesses. Defendant did not become a witness in his own behalf, thereby exercising a right conferred upon him by statute.

The court instructed the jury in substance that, if they found from the evidence beyond a reasonable doubt that the money taken from defendant at the time of his arrest was the identical money that had been stolen from complainant, "that fact, if such it be, shall be considered by you with all of the evidence in the case as tending to create a presumption which should be answered by the defendant," and, in that respect, that the jury should consider the failure of defendant to make an explanation of his possession of the stolen money. The court repeated the instructions at a later point in the charge, but in different language, saying that the jury should indulge in no presumptions against defendant because of his failure to testify in his own behalf, unless they believed from the evidence that the particular money was that which had been stolen from complainant, and that if they so found they might then consider the failure of defendant to explain away his possession of the money.

The instructions were properly excepted to on the motion for a new trial, and are here assigned as a violation of our statutes on the subject, and as prejudicial error for which a new trial should be granted. We think and so hold that the contention of defendant is well founded and must be sustained.

Our statute, G. S. 1913, § 8376, provides in substance that the failure of defendant in a criminal proceeding to take the witness stand and testify in support of his defense shall create no presumption against him, and that such failure shall not "be alluded to by the prosecuting attorney or by the court."

That the instructions of the court were in direct violation of the statute is clear. They were specific and to the point, and there is no room

for the suggestion of probable inadvertence on the part of the trial court. The effect of what the court in fact said to the jury was the same, though there was no intention expressly to draw the attention of the jury to the fact that defendant had not testified in support of his defense. The statute prohibits a reference to that fact by the trial court; it applies to all criminal prosecutions without exception, and a violation thereof is error though the result of inadvertence and mistake. *State v. Pearce*, 56 Minn. 226, 57 N. W. 652, 1065; *State v. Holmes*, 65 Minn. 230, 68 N. W. 11; *State v. Stoffels*, 89 Minn. 205, 94 N. W. 675. The error is conceded by the learned trial judge, and also by the attorney general, but it is contended that no prejudice resulted therefrom, for the reason that the evidence is practically conclusive of defendant's guilt, citing *State v. Ahern*, 54 Minn. 195, 55 N. W. 959, and *State v. Nelson*, 91 Minn. 143, 97 N. W. 652. In that view of the evidence a majority of the court are unable to concur. It is amply sufficient to sustain a conviction, but not so far conclusive as to render an error of this character harmless.

From what has been said we are not to be understood as holding that the court in a prosecution of the kind, and upon facts like those here presented, may not state to the jury the general rule that the unexplained possession of property shown to have been recently stolen, and with the theft of which defendant on trial is charged, is *prima facie* evidence that he stole it, and sufficient to take the issue of his guilt or innocence to the jury. The trial court may give that instruction. But to go further and make direct and specific reference to the failure of defendant to become a witness and explain the lawfulness of his possession, and say to the jury that they may consider his failure to testify in his own behalf, will constitute a violation of the statute and be reversible error, except, as in *State v. Ahern*, 54 Minn. 195, 55 N. W. 959, where the evidence of guilt is practically conclusive. Such is not the state of the evidence in the case at bar.

Order reversed.

JOHN F. BACON v. BANKERS TRUST & SAVINGS BANK.<sup>1</sup>

July 18, 1919.

No. 21,348.

**Contract of employment ratified by board of directors.**

1. The contract of employment involved in this action, though entered into by certain officers of defendant corporation without authority, was made valid and binding by the subsequent acquiescence of the board of directors, the contracting authority of the corporation, with knowledge of the facts.

**Whether wrongful discharge of plaintiff was breach of contract, question for jury.**

2. The question whether there was a breach of the contract by the wrongful discharge of plaintiff was one of fact, and the verdict of the jury thereon is sustained by the evidence.

**Evidence.**

3. There were no errors in the admission of the evidence.

Action in the district court for Hennepin county to recover \$4,500 for breach of a contract of employment. The facts are stated in the opinion. The case was tried before Jelley, J., who at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for \$4,800. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

*Henry Deutsch and Donald E. Bridgman*, for appellant.

*Cobb, Wheelwright & Dille and Hoke, Krause & Faegre*, for respondent.

BROWN, C. J.

Action for the breach of an alleged contract of employment in which plaintiff had a verdict, and defendant appealed from an order denying its alternative motion for judgment or a new trial.

<sup>1</sup>Reported in 173 N. W. 719.

Defendant was organized as a trust company and savings bank under and pursuant to the laws of this state, and entered upon the transaction of its business as such on December 4, 1916. The government and control of the company were, by its articles of incorporation as well as by its by-laws, vested in a board of directors of not less than 9 nor more than 35 members, chosen from the stockholders, though the active management of its affairs was given over to or at least assumed by the president, the secretary-treasurer, and the cashier, subject to the approval or disapproval of the directors. At the time of the organization the business of the institution was divided into departments, among others, a banking department, a savings department, a trust department and a bond department. These were presided over by managers who were selected and employed with special reference to the fitness of each for the particular work.

Plaintiff in this action, then a resident of Chicago, was an experienced bond salesman of which fact the president and secretary of the bank were familiar, and they initiated negotiations with him looking to his employment as manager of its bond department. The negotiations were participated in by the officers named and also the cashier and to a certain extent by one member of the board of directors, but the president and secretary were the moving factors therein; they were members of the board, though the cashier was not. The negotiations resulted in the employment of plaintiff for the department stated, and he was formally installed in the position on or about December 15, 1916, and on the eighteenth of that month the president formally executed a writing evidencing the contract of employment which plaintiff indorsed with his acceptance. This writing set forth all the terms of the employment, which was to continue for the period of one year from December 15, 1916. Plaintiff thereafter continued in the active discharge of the duties of the department, making purchases of bonds for the bank and attending to other detail work until April 27, 1917, when he was discharged from the service by the secretary for alleged disobedience of orders. His compensation was paid up to and including May 1. He was unable to obtain employment during the remainder of the year and brought this action to recover the amount that would have accrued to him from the date of the discharge, basing his action on the allegation



that the discharge was without justifiable cause or excuse, and constituted a breach of the contract.

Defendant interposed in defense that the contract of employment was invalid, for the reason that the president and secretary of the bank had no authority to enter into the same without being expressly thereto authorized by the board of directors, which authorization was not given. Therefore that defendant was not liable, even though plaintiff was wrongfully discharged. The rightfulness of the discharge was also alleged in defense.

The trial below developed three principal questions, namely:

(1) Whether the president and secretary had authority to enter into the contract, and, conceding that they had no such authority;

(2) whether the board of directors with knowledge of the facts subsequently ratified the same; and

(3) whether the discharge and dismissal of plaintiff were justified by the alleged disobedience of orders.

The trial court ruled as a matter of law that the president and secretary had authority to enter into the contract with plaintiff, and further that the board with knowledge of the facts subsequently ratified their action, thereby giving it validity and binding force even though not originally authorized. The third question was submitted to the jury and the verdict supports plaintiff's claim that his discharge was without justification or valid excuse.

1. We pass the question of the authority of the president and secretary to enter into the contract without discussion or comment, for we are clear that the trial court was fully justified by the evidence in holding as a matter of law that the contract was subsequently ratified by the directors with knowledge of the facts. That conclusion renders the question of the contracting authority of the president and secretary of no special importance, to which no further reference need be made. That leaves only the second and third questions for consideration. We dispose of them in their order.

2. The different departments of the bank were regularly created, presumptively by the board of directors, for the members thereof were, by the articles of incorporation and by the by-laws, given full authority and power in respect to the management of all its affairs. The creation

and existence of the bond department were advertised on the literature of the bank, and placarded within the banking building. By a public circular issued by the bank plaintiff was named as having charge of that department, coupled with the announcement that it had been opened for the transaction of business. Plaintiff was an experienced bond salesman, and immediately, upon being placed in charge of the department, became active in the discharge of his duties as manager thereof. He purchased bonds for the bank, and the purchases were approved. He recommended the purchase of other bonds as safe and suitable investments to be made. In the performance of his work he conferred with many of the directors, each of whom was thus informed of the position he occupied, though the matter of his employment never came before the board for official action. No member of the board became a witness on the trial to deny knowledge of his employment, or that the members thereof were not aware of the existence of the department of which he was in charge. Plaintiff's term of service commenced in December and continued until the latter part of April following. The board of directors held monthly meetings during that time and the members thereof made no objection to his presence at the bank nor to the work being performed by him. And, so far as the record discloses, no inquiry looking to an explanation of his presence in the banking house or his authority to represent the bank in the particular department was made by any of them. That they knew of his employment is clear.

It is settled law that a contract entered on behalf of a corporation by the unauthorized act of an officer or agent may be rendered valid and binding by ratification. 1 Dunnell, Minn. Dig. § 2116; Willis v. St. Paul Sanitation Co. 53 Minn. 370, 55 N. W. 550; Norwegian E. L. B. C. v. United States F. & G. Co. 81 Minn. 32, 83 N. W. 487. There is a ratification as a matter of law when it appears that the board of directors of the corporation, or other managing officers having the power and authority to enter into like contracts, either affirmatively approve of the unauthorized contract, or with knowledge of the facts silently acquiesce therein or fail promptly to repudiate it. 7 R. C. L. 663, et seq.

The facts in this case make a clear case of ratification by acquies-

ence. The employment of plaintiff was within the power of the corporation, and the evidence leaves no doubt that the directors, the managing authority of the bank, knew of the establishment of the bond department and of the employment of plaintiff to manage the same. Investments made by him involved large sums of money, the benefits whereof the bank received and retained. Unless the directors were wholly neglectful of their duties, and their silence on the subject will not justify the conclusion that they were (*Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. ed. 49), there was knowledge on their part of all the facts, and the failure to interpose their restraining hand is equivalent to an express approval of the contract. *Pittsburg, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.* 131 U. S. 371, 9 Sup. Ct. 770, 33 L. ed. 157; *Indianapolis Rolling Mill Co. v. St. Louis, F. S. & W. R.* 120 U. S. 256, 7 Sup. Ct. 542, 30 L. ed. 639; *Russell v. Waterloo Threshing Machine Co.* 17 N. D. 248, 116 N. W. 611; *Pink v. Metropolitan Milk Co.* 129 Minn. 353, 152 N. W. 725.

3. The contention that the evidence conclusively shows that plaintiff was justifiably discharged is not sustained. In our view of the record the question was one of fact for the jury, and the verdict is sufficiently supported.

The discharge was based on the ground that plaintiff had disobeyed orders in reference to the purchase of certain bonds, for which the secretary exercised the right to dismiss him from his employment. In support of the discharge defendant calls attention to a provision of its by-laws declaring that the board of directors shall decide upon all investments of the capital stock and other funds of the bank. It may be conceded that under the by-laws the board of directors had exclusive authority in the matter of bank investments, and that it was plaintiff's duty to obey orders and instructions issued by them. But that fact falls far short of showing a violation of duty by plaintiff. He was employed and installed as manager of the bond department, on the strength of his experience as a bond salesman, and went about the performance of his duties without specific orders or instructions from the board of directors. In fact we find no evidence that the board had issued or promulgated any order in reference to investments to be made by his department. Therefore plaintiff violated no orders coming to

him from that direction. The secretary assumed the right to give orders, but by what authority does not appear. No officer of the bank by action of the directors was made general manager of its affairs, or of the various departments, and, so far as the record advises us, the general supervisory authority which seems to have been exercised by the secretary was not a grant from the governing board. He claimed no such authority, but testified that he made it his business to see to and watch the expenditures of the bank. While his efforts in this respect were commendable, the exercise of such authority did not operate to displace the board of directors, or, as a matter of law, justify the issuance of orders which should come primarily from them. And although he may have had some right of control over plaintiff in the matter of purchasing bonds, we think it was a fair question for the jury to say whether a violation of his orders constituted a disobedience of plaintiff's duties and obligations to the corporation.

4. The assignments of error, challenging the rulings of the court in the admission of certain evidence, have all been considered, with the result that no prejudicial error appears.

Order affirmed.

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BERT L. SKILLINGS v. V. A. ALLEN.<sup>1</sup>

July 18, 1919.

No. 21,361.

**Physician and surgeon — negligence — complaint sufficient.**

1. A complaint states a cause of action when it is alleged therein that defendant, a physician, was employed by plaintiff to attend his minor daughter professionally while she was sick; that, knowing that the child's disease was scarlet fever, he negligently advised plaintiff's wife, who inquired in his behalf as well as in her own, that it was safe to visit the child, then in a hospital and under defendant's care; that he also advised her that it was safe to remove the child from the hospital to plaintiff's home, and that there was no danger that the disease would be communicated, although it was then at a stage when great danger of infection existed, and that plaintiff and his wife did not know of the

<sup>1</sup>Reported in 173 N. W. 663.

infectious nature of the disease and relied on defendant's advice, and accordingly visited their child at the hospital and removed her to their home, and plaintiff thereby contracted scarlet fever to his damage.

**Negligence — responsibility for direct results.**

2. Generally speaking, one is responsible for the direct consequences of his negligent acts whenever he is placed in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that person. This principle is applicable to the facts stated and the court properly overruled a demurrer to the complaint.

Action in the district court for Crow Wing county to recover \$1,000. Defendant's demurrer to the complaint was overruled, McClenahan, J., and the questions presented by the demurrer certified as important and doubtful. From the order overruling the demurrer, defendant appealed. Affirmed.

*C. D. & R. D. O'Brien*, for appellant.

*A. D. Polk* and *L. B. Kinder*, for respondent.

LEES, C.

This is an appeal from an order overruling a demurrer to the complaint interposed on the ground that no cause of action was stated. The court certified that the question raised was important and doubtful.

In substance the complaint alleged that defendant was a practicing physician, employed by plaintiff and his wife to treat their minor daughter who was ill. The defendant knew that the disease from which the child was suffering was scarlet fever and that it was infectious. Plaintiff's wife, acting in his and her own behalf, consulted defendant as to the nature of the disease and the danger of infection. Defendant wrongfully and negligently advised her that they might safely visit their child, who was then at a hospital under his care. He negligently permitted them to visit the child at the hospital, and later on wrongfully and negligently advised plaintiff's wife that she could be safely removed from the hospital to her home, and that there was no danger that the disease would be communicated, although it was then at the "peeling off" stage, when the greatest danger of infection exists. In reliance upon defendant's advice, the child was removed to her home.

Neither plaintiff nor his wife knew of the infectious nature of the disease. Both relied on defendant's advice in visiting their child while sick at the hospital and in taking her from the hospital to her home. By reason of their contact with her, both contracted scarlet fever and plaintiff suffered pain and was kept from his work for many weeks, to his damage in the sum of \$1,000.

The case is a novel one. Counsel for defendant assert that none like it has heretofore been presented to any court so far as they have been able to ascertain. They contend that a cause of action is not stated because there were no contractual relations between plaintiff and defendant. The statement in the complaint, that the child was under defendant's care "pursuant to solicitation and employment by plaintiff and his wife," amounts, we think, to an allegation that there were such relations. True, the child was defendant's patient, but can it be said that, therefore, he owed no contractual duty to her parents by whom he was employed? The child would have a cause of action against defendant for the consequences of any failure on his part to treat her with ordinary professional skill and care, though she did not employ him. Plaintiff might also have a cause of action entirely separate and apart from that of his child for the loss of her services, due to the same failure to exercise ordinary professional care which gave rise to the child's cause of action. 21 R. C. L. 398.

Generally speaking, one is responsible for the direct consequences of his negligent acts whenever he is placed in such a position with regard to another that it is obvious that if he does not use due care in his own conduct he will cause injury to that person. *Depue v. Flatau*, 100 Minn. 299, 111 N. W. 1, 8 L.R.A.(N.S.) 485. It was remarked in *Farrell v. Minneapolis & R. R. Ry. Co.* 121 Minn. 357, 361, 141 N. W. 491, 492, 45 L.R.A.(N.S.) 215, that: "It is now generally recognized that each member of society owes a legal duty, as well as a moral obligation, to his fellows." Assuredly this is a case where there is every reason to hold that defendant was under a legal duty to plaintiff, and it is of little practical difference whether we call the duty contractual or noncontractual.

The health of the people is an economic asset. The law recognizes its preservation as a matter of importance to the state. To the indi-

vidual nothing is more valuable than health. The laws of this state have been framed to protect the people, collectively and individually, from the spread of communicable diseases. Scarlet fever is classed as such a disease. The state board of health is charged with the duty of prescribing regulations for the disinfection and quarantine of persons and places as an incident in the treatment of all infectious diseases, and physicians are required to report all infectious cases to their local boards of health. Chapter 345, p. 489, Laws 1917. When defendant discovered that plaintiff's child was suffering from an infectious disease, it became his duty to comply with the laws of the state in the particulars mentioned, in order that the public health might be protected. His duty did not stop there. The child's parents were naturally exposed to infection to a greater degree than anyone else. To advise them that they ran no risk in visiting her at the hospital or in taking her into their home, necessarily exposed them to danger if they acted on the advice, and defendant was bound to know that they would be likely to follow his advice. It is alleged that the advice was given negligently, and all the necessary elements of a cause of action based on negligence are present.

The following cases, in one respect or another, bear on the questions mooted here:

*Peterson v. Phelps*, 123 Minn. 319, 143 N. W. 793, Ann. Cas. 1915A, 257, holding that a physician's responsibility to use due care is not dependent on an express agreement of employment or promise to pay for his services.

*Harriott v. Plimpton*, 166 Mass. 585, 44 N. E. 992, holding that there may be liability for negligence where the purpose of an examination made by a physician was not medical treatment but information.

*Hewett v. Woman's Hospital Aid Assn.* 73 N. H. 556, 64 Atl. 190, 111 Am. St. 607, holding that a hospital association was liable to a student nurse for putting her in charge of a diphtheria patient without warning her of the danger of contagion, she having contracted the disease through failure to take proper precautions to guard against infection.

*Piper v. Menifee*, 12 B. Mon. 465, 54 Am. Dec. 547, holding that a physician was liable for communicating smallpox to a patient, when he

was attending several persons who had the disease, and advised plaintiff that there was not danger of his contracting it because he changed his clothes after visiting smallpox patients, and so was allowed to continue to visit him as his physician.

*Missouri, K. & T. Ry. Co. v. Wood*, 95 Tex. 223, 66 S. W. 449, 56 L. R.A. 592, 93 Am. St. 834, holding that a railway company was liable to plaintiff for negligently permitting one of its employees to escape from a detention hospital where he was undergoing treatment for smallpox at the hands of its physician. After escaping, he came in contact with plaintiff and his family and communicated the disease to them.

*Span v. Ely*, 8 Hun, 255, holding that a physician who employed a man to whitewash a house in which one of his patients had recently died of smallpox, assuring him that the house had been disinfected and that he would be safe in entering it, was liable to the man who contracted the disease while whitewashing the house.

*Edwards v. Lamb*, 69 N. H. 599, 45 Atl. 480, 50 L.R.A. 160, holding that a physician was liable to a woman for negligently advising her that it was safe for her to assist in dressing an infectious wound her husband had received, she having acted on the advice and being infected. The essential facts which furnished the basis of the decision last cited are closely parallel to those in the case at bar. We quote a portion of the opinion as apposite to this case:

"The situation was such that she needed the advice of a physician. This the defendant knew. He knew of her danger and negligently advised her as to it and she was injured by following his advice. That when he advised her he assumed the obligation to use due care in so doing is not open to doubt. \* \* \* If the contract to attend the plaintiff's husband were eliminated from the case, the liability would be the same. The gratuitous character of the services rendered to the plaintiff would not excuse the defendant's failure to exercise such care as the circumstances demanded. \* \* \* On the other hand, if the advice to the wife is treated as a part of the performance of the contract with the husband, the defendant still owed her the noncontractual duty to use care in the performance of such of his services as concerned her personally."

We conclude that the complaint is not demurrable, although it may



be true, as suggested by defendant's counsel, that it is a matter of common knowledge that scarlet fever is an infectious disease, and that plaintiff may not have been greatly influenced by defendant's alleged assurance that he might visit his child or take her to his home without running any risk of infection.

Order affirmed.

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IN THE MATTER OF THE ESTATE OF FREDERICK A.  
BERDELL, DECEASED.

AMANDA ANDERSON v. WILLIAM OLESON, AS ADMINIS-  
TRATOR OF SAID ESTATE, AND OTHERS.<sup>1</sup>

July 18, 1919.

No. 21,368.

**Bastard — letter sufficient to satisfy statute.**

1. A letter alleged to have been written and signed by deceased, attested by a witness and sent to respondent, is *held* to be sufficient in form to constitute an acknowledgement of paternity under G. S. 1913, § 7240.

**Secondary evidence of lost letter.**

2. Where such a letter is lost, secondary evidence of its contents may be received.

**Witness — testimony as to contents of lost letter.**

3. Respondent, an interested party, is not disqualified by G. S. 1913, § 8378, from testifying as to its contents.

**Bastard — evidence of receipt of letter.**

4. The evidence is sufficient to sustain a finding that the letter was written and sent to respondent and received by her.

**Secondary evidence of lost letter.**

5. The evidence of the loss of the letter is sufficient to permit secondary evidence of its contents.

From the final decree of the probate court for Watonwan county in the estate of Frederick A. Berdell, deceased, vesting title to the real estate and personalty in certain brothers and sisters and the children of

<sup>1</sup>Reported in 173 N. W. 665.

deceased brothers and sisters of decedent, Amanda Anderson appealed to the district court for that county. The appeal was heard by Comstock, J., and a jury which answered in the affirmative the question quoted in the second paragraph of the opinion. The court made findings and reversed the order of the probate court. From an order denying their motion for a new trial, William Oleson, administrator of the estate, and others appealed. Affirmed.

*Edward Farmer*, for appellants.

*S. B. Wilson*, for respondent.

HALLAM, J.

Frederick A. Berdell died January 29, 1917, intestate. He was unmarried. Respondent claimed to be his daughter and claimed his estate. The probate court denied her claim. She appealed to the district court. She prevailed there and other claimants of the estate, relatives of deceased, appeal.

1. Our statute provides that "an illegitimate child shall inherit \* \* \* from the person who, in writing and before a competent attesting witness, shall have declared himself to be his father." G. S. 1913, § 7240. The court submitted to a jury the question: "Did Frederick A. Berdell, in his lifetime, in writing before a competent, attesting witness, declare himself to be the father of Amanda Anderson?" The jury found in the affirmative. The court confirmed and adopted the finding and thereupon ordered judgment assigning the estate to respondent.

The alleged acknowledgement was by a letter claimed to have been written by deceased to respondent in 1915. Deceased then lived at Odin, Minnesota, and respondent at Los Angeles, California.

The material part of the letter as testified to by respondent was as follows: "I am told you should have from me a letter, signed by a witness showing that you are my child and I am your father, and this letter is to show that you are my child and I am your father, and I had Ole A. Larson sign it as a witness.

"With love, your father,

"F. A. Berdell.

"Ole A. Larson."

If such a letter was written it was sufficient acknowledgement to comply with the statute.

2. The letter was not produced. Respondent testified that it was lost and she and Ole A. Larson, the attesting witness, were permitted to testify to its contents.

Appellants contend that this was error, that in order to make the proof contemplated by the statute the writing itself must be in existence and must be produced in court, "that unlike other writings that have become lost, secondary evidence in this case is not admissible." We do not understand this to be the law. Secondary evidence of a lost instrument may be received, even though the instrument be one which the law requires to be in writing. 2 Enc. Ev. 317, 318; *In re Devoe's Estate*, 113 Iowa, 4, 84 N. W. 923; *Taylor v. Riggs*, 1 Pet. 591, 7 L. ed. 275. Counsel quotes the language of the court in *Pederson v. Christofferson*, 97 Minn. 491, 502, 106 N. W. 958, 962, that "the only competent proof that the testator acknowledged the contestant to be his child was a writing signed and witnessed as the statute requires." But the court was plainly speaking of the necessity of written, as contrasted with oral, acknowledgment of paternity, and had no reference to the proper means of proof of the writing when one is made.

3. Section 8378, G. S. 1913, provides that "it shall not be competent for any party to an action, or any person interested in the event thereof, to give evidence therein of or concerning any conversation with, or admission of, a deceased \* \* \* person, relative to any matter at issue between the parties." There are certain exceptions not material here. Appellants urge that, under this statute, respondent, being an interested party, was not competent to testify as to the contents of the letter written by the deceased. There is creditable authority sustaining appellants' contention. See 40 Cyc. §§ 2325, 2328; *McCorkendale v. McCorkendale*, 111 Iowa, 314, 82 N. W. 754; *Stevens v. Witter*, 88 Iowa, 636, 55 N. W. 535. But the question has been decided in this state adversely to the appellants' contention. This court long ago held that the statute refers to spoken words and does not preclude an interested party from giving evidence of the contents of a lost document executed by deceased. *Livingston v. Ives*, 35 Minn. 55, 62, 27 N. W. 74; *Newton v. Newton*, 46 Minn. 33, 37, 48 N. W. 450; *Hulett*

v. Carey, 66 Minn. 327, 334, 69 N. W. 31, 34 L.R.A. 384, 61 Am. St. 419.

4. It is contended that the showing made as to the writing and sending of the letter is sufficient. Respondent testified positively that she received such a letter. Ole A. Larson testified that he saw deceased write and mail a letter to respondent, and the version he gives of its contents identifies it as the letter which respondent testified she received. Larson testified to the circumstances, said that one day while they were traveling on the train together deceased told him that he had a daughter, "an heir," that he told deceased that he had read in a newspaper that in order to have a legal heir "he would have to have it in writing and a witness to it." That deceased said "if that was so he could fix that up all right," and when they left the train they went to a saloon and there deceased procured writing material and this letter was written and signed and witnessed by Larson. The evidence is not contradicted and in the nature of things could not be; counsel argue that the story, though not contradicted, is unreasonable and improbable. The question presented is purely one of fact. The jury found the stories of respondent and Larson true. Their stories are reasonably consistent and not impossible nor so improbable that an appellate court can reject them as untrue. They sustain the findings that the letter was in fact written by deceased and received by respondent.

5. It is contended that the evidence of the loss of the letter is insufficient to permit secondary evidence of its contents. Appellant's testimony is that she was employed in Los Angeles, California, as a household servant; that she received the letter and kept it in her trunk with other letters; that she kept the trunk in her room and all her things were confined to that room; that, before the trial, she searched for the letter, took everything out of the trunk, shook everything, then took everything out of the dresser drawers, searched for it all over the room and in the closet, took up the rug and searched under it, searched the bedding; that she looked in every place where she had ever kept letters, but could not find it, and that she believed that it had accidentally gotten in with a bunch of letters that she had burned. It is difficult to see how the loss of the letter could be more effectively proven. Two other persons, her employers, lived in the house. Appellant contends she should have asked them whether they saw it, took it or had it. But

her testimony is that they never "interfered with" her room, nor frequented it. Due diligence would hardly require that she inquire of them as to the whereabouts of a private letter commonly kept in her private trunk.

Order affirmed.

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**ALFRED JOHNSON v. HANS A. BRASTAD AND ANOTHER.<sup>1</sup>**

**July 25, 1919.**

**No. 21,185.**

**Contributory negligence — mental capacity of plaintiff — question for jury.**

1. Plaintiff was struck and injured by defendant's auto truck at a street intersection. The evidence made a question for the jury as to whether he was guilty of contributory negligence, and also as to whether he possessed sufficient mental capacity to understand the nature and effect of his act at the time he executed the release relied upon by defendants.

**Charge to jury.**

2. The statement in the charge that plaintiff was entitled to the right of way at the time of the collision was not unduly prejudicial in view of the facts and of the remainder of the charge.

**New trial — misconduct of attorney.**

3. The misconduct of plaintiff's attorney in asking improper questions and making improper remarks was not of sufficient consequence to require a new trial.

Action in the district court for Hennepin county to recover \$17,650 damages for injuries received by being struck by defendants' motor truck. The answer set up the release and settlement with plaintiff which is mentioned in the opinion. The case was tried before Rockwood, J., who at the close of the testimony denied defendants' motion for a directed verdict, and a jury which returned a verdict for \$8,030. From an order denying their motion for judgment notwithstanding the verdict or for a new trial, defendants appealed. Affirmed.

*Watson, Sexton & Mordaunt* and *P. J. McLaughlin*, for appellants.  
*Hoke, Krause & Faegre* and *Neil M. Cronin*, for respondent.

<sup>1</sup>Reported in 178 N. W. 668.

TAYLOR, C.

Plaintiff recovered a verdict for injuries caused by being struck by defendants' auto truck at a street intersection in the city of Minneapolis. Defendants made an alternative motion for judgment notwithstanding the verdict or for a new trial, and appealed from an order denying their motion.

1. It is conceded that the evidence warranted a finding of negligence on the part of the driver of the truck, but defendants contend that the evidence conclusively shows that plaintiff was guilty of contributory negligence. Plaintiff was walking in a southerly direction along the easterly side of Minnehaha avenue early in the evening, and the accident happened as he was crossing Franklin avenue. Double street car tracks extend along both these avenues. It was not very dark and there was an electric light at the street intersection. The headlights of the truck were lighted, but were quite dim, as they were turned on only partially, and the lenses had been coated with soap to avoid violating the dimming ordinance. The only evidence concerning plaintiff's conduct is his own testimony. He stated that when he stepped from the curb onto the pavement of Franklin avenue he looked first toward the east and then toward the west and saw no street cars or other vehicles approaching from any direction and no pedestrians on the street; that he proceeded across Franklin avenue without again looking either east or west, and that when near the south rail of the south track on that street, he was struck by the truck which came from the west and which he did not see until after he was struck.

Defendants insist that plaintiff's failure to observe the lights of the approaching auto when he stepped into the street and his failure to look again while proceeding some 30 feet, coupled with the fact that there was nothing to distract his attention, conclusively shows that he was chargeable with contributory negligence. Although the facts and circumstances are sometimes so conclusive that a court can say as a matter of law that the plaintiff was guilty of contributory negligence, this is usually a question for the jury. In the present case, plaintiff, after stepping into the street, looked both ways, and, having satisfied himself that the street was clear in both directions, proceeded on his way without looking again. If the street had in fact been free of vehicles he could have crossed in safety. The street was bordered with

business places and with lights of various sorts. Whether, under all the circumstances, plaintiff was negligent in failing to look with sufficient care to discover the approaching auto with its dim light, or in failing to look again before crossing the south track, was in our opinion a question for the jury. We cannot say that negligence is conclusively proven. *Stallman v. Shea*, 99 Minn. 422, 109 N. W. 824; *Arseneau v. Sweet*, 106 Minn. 257, 119 N. W. 46; *McAweeny v. Journal Printing Co.* 114 Minn. 262, 130 N. W. 1103; *Johnson v. Scott*, 119 Minn. 470, 138 N. W. 694; *Theisen v. Durst*, 138 Minn. 353, 165 N. W. 128.

2. Defendants made a settlement with plaintiff by which they paid him the sum of \$2,500 and received a release of all claims for damages. Four days later the full \$2,500 was tendered back to them, on the ground that plaintiff was mentally incompetent to make the settlement at the time it was made. They refused to take back the money and it was deposited in a bank, where it still remains. They interposed the settlement as a bar to the action. The court instructed the jury to the effect that plaintiff was presumed to have had sufficient mental capacity to make the settlement, and that it was binding and conclusive upon him, unless he established "by clear and convincing evidence that by reason of the condition of his mind at the time he executed the release he did not know or understand what he was doing." The verdict for plaintiff amounted to a finding that he was mentally incompetent to make a settlement at the time he executed the release. Defendants contend that this finding is not justified by the evidence. The question here is not whether this court would reach the same conclusion from reading the cold record which the jury reached from hearing the witnesses, but whether there is any substantial evidence which, if believed by the jury, would warrant them in finding the verdict which they returned. We have examined the evidence with care and find enough tending to show mental incompetency to make that issue a question for the jury.

3. Defendants took no exceptions to the charge at the trial, but by their assignments of error in the motion for a new trial and on this appeal challenge its correctness in several respects. Most of the statements to which exception is taken were unobjectionable. The most questionable one is the statement that plaintiff was entitled to the right of way at the time of the collision. This statement is found in the following paragraph:

"Each of the avenues was a public highway, and both plaintiff and defendants were using them for legitimate highway purposes. Their rights and their duties towards each other were equal and reciprocal. Neither the pedestrian, as such, nor the automobile driver, as such, had right of way over the other. If they approached the point where their lines of movement intersected at about the same time, it was the right of the one arriving first to pass first. That is, the one that reached the point of intersection first had the right of way. In this case it appears positively by the defendants' own testimony that the plaintiff arrived first at the point of intersection. The plaintiff, therefore, had the right of way under the circumstances of this case. In approaching this intersection it was the duty of each, the plaintiff and the defendants, to be mindful of the rights of others who might be on the crossing, to be on the lookout and to do all that reason required to avoid inflicting or receiving injury."

Defendants contend, not that the court was mistaken in saying that their own evidence showed that plaintiff was entitled to the right of way, but that this instruction "was, in effect, an instruction that the defendants were negligent and that the plaintiff was free from blame."

The question as to whether plaintiff or the driver of the automobile was entitled to the right of way had no decisive or important bearing on the present case. It did not enter as an element into the happening of the accident, for neither plaintiff nor the driver saw the other in time to avert the collision, and neither acted in the expectation that the other would give him the right of way. The court repeatedly impressed upon the jury the fact that the plaintiff and the defendants had equal rights in the street and that an equal and reciprocal duty rested upon each to exercise reasonable care to avoid a collision. The court also gave full and explicit instructions in respect to negligence and contributory negligence. In view of all the circumstances and of the other instructions we think the jury could not have been misled into giving undue weight to the statement that plaintiff had the right of way.

4. Defendants further contend that they are entitled to a new trial on account of the misconduct of plaintiff's attorney in persistently asking improper questions and making improper statements in the presence of the jury. His conduct was censurable and we would be better satisfied if the court had enforced the rules of propriety with greater



strictness, but we are not justified in granting a new trial merely for the purpose of punishing the attorney. A similar situation was considered in *Hammel v. Feigh*, supra, page 115, 173 N. W. 570, and this case falls within the rule there stated.

Order affirmed.

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**HANS A. BOGSTAD v. O. J. ANDERSON AND ANOTHER.<sup>1</sup>**

July 25, 1919.

No. 21,283.

**Judgment after dismissal.**

1. Judgment was erroneously given against a defendant as to whom the action had been dismissed.

**Chattel mortgage — foreclosure sale — recovery of consideration paid.**

2. Where a purchaser at a chattel mortgage foreclosure sale sues to recover the consideration paid on the theory that the mortgage was discharged before foreclosure, the burden is upon him to prove such discharge.

**Judgment not res judicata.**

3. A judgment, rendered after the sale, in an action between the defendant and the mortgagor, is not evidence in favor of the plaintiff in this action, nor is a judgment in an action between this plaintiff and another claimant of the property.

**Chattel mortgage — proof of discharge.**

4. Where the giving of the mortgage is admitted, a statement by the mortgagor that the mortgagee had no mortgage or no claim on the mortgaged property is not sufficient to prove the nonexistence of the mortgage or its discharge.

**Same — no warranty of title on foreclosure sale.**

5. There is no warranty of title on a foreclosure sale, but there is a warranty or representation by the mortgagee that he has a subsisting mortgage on the property sold.

Action in the district court for Kittson county to recover \$300. The allegations of the complaint are set out at the beginning of the opinion. Defendants' demurrers to the amended complaint were overruled. The case came on for trial, when defendants' motion for judgment on the

<sup>1</sup>Reported in 173 N. W. 674.

pleadings was denied and the motion of defendant Anderson to dismiss the action as to him was granted by Grindeland, J., who made findings and ordered judgment in favor of plaintiff. Judgment was entered against both defendants, who appealed separately from the judgment. On appeal of defendant Anderson, judgment reversed and judgment of dismissal ordered. On appeal of defendant Wilson, reversed and new trial granted.

*Julius J. Olson, Rasmus Hage and John A. Pearson, for appellants.  
P. A. McClernan, for respondent.*

HALLAM, J.

Plaintiff alleged in his complaint:

That defendants received from him \$300 without consideration, the facts being that defendant Wilson claimed to hold a chattel mortgage by Conrad Anderson upon a team of horses, that defendant caused notice of foreclosure sale to be given and caused the property to be sold to plaintiff for \$300; that in a suit between Anderson and defendant Wilson it was adjudged that defendant Wilson had no mortgage; that thereafter defendant Wilson sued Anderson on the debt for which she had attempted to foreclose the mortgage; that Anderson had executed another mortgage to a bank at Karlstad; that the bank foreclosed its mortgage and sold the horses and took them from plaintiff; that plaintiff sued the bank to test the validity of its mortgage and to recover the value of the horses, and that in that action it was adjudged that the bank had a valid and subsisting mortgage on the team; that because the Karlstad bank had taken the horses from plaintiff it was impossible for him to return them, and plaintiff demanded judgment against both defendants for \$300.

There is no allegation of the invalidity of defendant Wilson's mortgage and no allegation that the Karlstad bank had a valid mortgage on the team, unless such results may be inferred from the allegations as to the outcome of the lawsuits between these other parties.

1. Defendant Anderson was sheriff of Kittson county. On the trial the case was dismissed as to him. Yet judgment was given against him. Plaintiff testified that he paid \$245 for the team on foreclosure sale. Yet judgment was given for \$300 and interest. Both defendants appeal.

On the appeal of defendant sheriff, the judgment must be reversed and judgment of dismissal ordered.

2. As to defendant Wilson the judgment is also erroneous. Plaintiff in his testimony claimed but \$245. Judgment for \$300 is manifestly excessive. Further than this, if it can be said that the complaint states a cause of action, we think the evidence was insufficient to sustain any judgment for plaintiff.

On the trial the mortgage from Anderson to defendant Wilson was introduced in evidence. Anderson, on the witness stand, admitted having given the mortgage. There is no claim that it was not a valid mortgage when given. The foreclosure proceedings were put in evidence. The proceedings were regular in form and the property was sold and delivered to the plaintiff as the purchaser.

The position taken by plaintiff's counsel in his brief is that the Anderson mortgage was paid and discharged before the foreclosure. The burden of proving this was upon the plaintiff. 11 C. J. 694; Gaffney Live Stock Co. v. Bonner, 92 S. C. 122, 126, 75 S. E. 362; Gardner v. Roach, 111 Iowa, 413, 82 N. W. 897.

There is no evidence of such payment or discharge. The judgment in the case of Anderson v. Willson is not evidence in this case. In that case Anderson secured judgment against defendant Willson for conversion of the team by its sale and delivery to plaintiff. Anderson v. Willson, 132 Minn. 364, 157 N. W. 582. The judgment was naturally rendered after the foreclosure sale. The parties were not the same as in this case. The proceedings in that case were *res inter alios acta*. Whitcomb v. Hardy, 68 Minn. 265, 71 N. W. 263. The same is true of the judgment in the suit brought by this plaintiff against the Karlstad bank.

4. Anderson was asked if the mortgage had been paid, but the answer was ruled out. The only evidence tending to impeach the mortgage was as follows: Anderson was asked: "Did Mrs. Wilson have a mortgage on those horses at the time" of the foreclosure? He answered: "No." "Did Mrs. Wilson have any claim given by you to those horses at the time she took them away from you?" He answered: "No." Plaintiff was asked: "Did you ever get any value for the money you paid for those horses to these defendants?" He answered: "No." In view of the admitted fact that the mortgage was given, we think

this testimony was not sufficient to prove either the nonexistence of the mortgage or its payment and discharge.

5. For the purpose of a new trial we may say there was no warranty of title on the foreclosure sale. That is, if the Wilson mortgage was a subsisting mortgage at the time of the foreclosure, there was no warranty against prior incumbrances. 11 C. J. 713; Jones, Chattel Mortgages, § 819; Harris v. Lynn, 25 Kan. 281, 37 Am. Rep. 253; Cohn v. Ammidown, 120 N. Y. 398, 24 N. E. 944. But we think there was a warranty or a representation that defendant Wilson had a subsisting mortgage upon the property sold. This is the rule as to pledges, Morley v. Attenborough, 3 Exch. 500, and should be the rule applicable to chattel mortgages. If the mortgage was in fact paid, plaintiff was entitled to a return of his money.

Judgment reversed, new trial granted.

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JOHN H. McCLURE, DOING BUSINESS AS THE McCLURE  
CONTRACTING COMPANY v. VILLAGE OF BROWNS  
VALLEY.<sup>1</sup>

July 25, 1919.

No. 21,327.

**Evidence of value by owner.**

1. The president of a village council, having no special or intimate knowledge of the nature or quality of the materials entering into the construction of a bridge owned by the village, does not come within the rule that the owner of property may testify to its value.

**Appeal and error — refusal to give requested instruction.**

2. Error cannot be predicated upon the court's refusal to give a requested instruction containing a correct abstract statement of law which is not applicable to any of the issues in the case.

**Bridge — recovery of price — statute.**

3. Section 2600, G. S. 1913, relating to the strength of public bridges, does not prevent a bridge builder from recovering the contract price of a bridge which has not been submitted to the test referred to in the statute, but which has supported a weight four times as great as that

<sup>1</sup>Reported in 173 N. W. 672.

required by the specifications and three times as great as that required by the statute.

**Contract — question of substantial performance for the jury.**

4. The evidence required the court to submit to the jury the question whether there had been a substantial performance of the contract to build the bridge, under the rule that ordinarily the question of substantial performance is one for the jury, and justified the jury in finding that there had been such performance.

Action in the district court for Traverse county to recover \$3,040, the contract price of a certain bridge. The case was tried before Flaherty, J., who when plaintiff rested denied defendant's motion to dismiss the action, and a jury which returned a verdict for \$2,653 and interest. From an order denying its motion for a new trial, defendant appealed. Affirmed.

*D. J. Leary, Charles E. Houston and James B. Ormond*, for appellant.

*Murphy & Anderson*, for respondent.

LEES, C.

This action was brought to recover the contract price of a bridge. Plaintiff had a verdict. A new trial was denied and defendant appeals.

On June 25, 1915, the parties to this action executed a contract whereby plaintiff undertook to construct a concrete bridge over the Minnesota river, in accordance with plans and specifications which defendant had procured, and which, by reference, were made part of the contract. He also undertook to provide a temporary bridge over the river while the new bridge was under construction, and to remove an old bridge which the new one replaced. Defendant agreed to pay him therefor \$2,748 and the cost of the temporary bridge, plus 10 per cent, such cost not to exceed \$150.

The complaint alleged performance of the contract on plaintiff's part and a refusal by defendant to pay him anything. It also alleged that the actual cost of the temporary bridge was \$146 and that extra labor and materials were furnished during the progress of the work of the value of \$146. Judgment for \$3,040 and interest was demanded.

The answer denied performance of the contract; alleged that a bridge was built, but not such a bridge as the contract called for, in that it

was defectively constructed and was unsafe for ordinary traffic; admitted that a temporary bridge was built by plaintiff, but denied that it cost more than \$25, and denied the furnishing of any extra labor or materials. It also pleaded, as a counterclaim, carelessness on plaintiff's part in taking down the old bridge and his conversion of part of it to defendant's damage in the sum of \$500. There were other counterclaims, but they were eliminated from the case and need not be referred to. The verdict was for \$2,653, with interest from the date of the completion of the bridge. We take up the questions raised in the order in which they were presented in the argument.

1. The president of the village council was called as a witness for defendant and over objection testified that the value of the old bridge when plaintiff removed it was \$500. Later on this testimony was stricken out on plaintiff's motion, on the theory that the witness had no qualifications which made him competent to testify to the value of the old bridge. There was no error in this. The witness was an attorney at law, without special knowledge of the value of the materials entering into the construction of bridges. The rule that the owner of property may testify to its value has no application. The bridge was owned by the village. Its president represented it, but was not shown to have any more intimate knowledge of the nature and quality of the materials in the bridge than any other inhabitant of the village. Such intimate knowledge furnished the only basis for the rule. *Derby v. Gallup*, 5 Minn. 85 (119); *Crich v. Williamsburg City Fire Ins. Co.* 45 Minn. 441, 48 N. W. 198.

2. The court was requested to instruct the jury that persons dealing with a municipality are chargeable with notice of its powers and the powers of its officers. The instruction was not given and error is assigned on that score. As an abstract statement of the law there was no fault in the requested instruction, but it had no application to the issues in the case and hence the court was not required to give it. The village had power to make the contract with plaintiff and its officers had power to execute it in its behalf. There is no question in the case of the usurpation of power on the part of the village officials, and no claim that the legitimate powers of the village were transcended.

3. Section 2600, G. S. 1913, reads as follows:

"All bridges hereafter constructed on any public street or highway in

any county, township, town or village, in the state of Minnesota, shall be of sufficient strength to support, with perfect safety, any wagon, engine or other vehicle with a weight of twenty tons on two axles with ten foot centers, with not to exceed three-fourths of said weight concentrated on one axle, when driven at a speed of not to exceed three miles an hour; nothing herein contained shall apply to any automobile."

The court was asked to instruct the jury that "plaintiff \* \* \* was charged with notice of what the law (section 2600) required with reference to the bridge in question." This instruction was not given. In denying the motion for a new trial, the court held that the statute did not forbid the making of a bridge contract which failed to provide for a test of the strength of the bridge as directed by the statute, or the maintenance of an action on such a contract for the recovery of the contract price. We find it unnecessary to consider whether this is a correct interpretation of the statute, for it conclusively appears that the bridge was so constructed that it supported a weight of over 60 tons. Its strength was four times as great as that required by the specifications and three times as great as that required by the statute, hence defendant was in no position to contend that the statute had not been complied with and no possible prejudice could result from the court's refusal to give the requested instruction.

4. The weight of the argument is directed to the sufficiency of the evidence to sustain the verdict. It appears that the bridge sags perceptibly. When the concrete was poured in the forms for the girders, they settled two or three inches, and jackscrews were used in an attempt to bring them back to a level. There is an excessive camber or upward curve in one of the girders. There are numerous cracks and holes in the concrete and the reinforcing rods are exposed in places. The concrete is not of the same color and the bridge presents a rough appearance displeasing to the eye.

It appears, however, that it has been in constant use since it was completed in September, 1915. Its strength has been tested by running three steam tractor engines upon it at the same time. Their combined weight with that of the water and coal carried was over 60 tons. The bridge stood the test. The specifications only required it to be strong enough to carry a 15-ton engine of the ordinary type used by threshers.

The bridge was not constructed in strict accordance with the plans

and specifications. Few concrete bridges are. The court submitted the case to the jury on the theory that plaintiff might recover if he had substantially performed his contract. If he had so performed, the jury were told to make an allowance out of the contract price to cover the cost of remedying defects and omissions. The law was laid down in accordance with the principles stated in *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309, to which this court has repeatedly given its approval. *Anderson v. Pringle*, 79 Minn. 433, 82 N. W. 682; *Blakely v. J. Neils Lumber Co.* 121 Minn. 280, 141 N. W. 179; *Snider v. Peters Home Bldg. Co.* 139 Minn. 413, 167 N. W. 108. Ordinarily the question whether plaintiff has substantially performed a building contract upon which he sues is a question for the jury. *Brown v. Hall*, 121 Minn. 61, 140 N. W. 128; *Snider v. Peters Home Bldg. Co.* *supra*. The instructions to the jury were clear and comprehensive and no exception was taken to them. The jury gave plaintiff \$387 less than he claimed. In denying the motion for a new trial, the learned district judge said:

"The case was fairly tried to a good, intelligent jury, who evidently found in favor of defendant on every question submitted to it, except that there was a substantial performance of the contract, and they must have made a very liberal allowance to defendant for imperfect work."

We have been impressed by a careful reading of the record, with the conviction that the bridge is safe enough for every kind of traffic it will have to sustain and that the chief complaint which the village may justly make rests on the unsightly appearance the bridge presents. It is evident that it bears the marks of poor workmanship and is not a municipal ornament, but neither the contract nor the specifications require it to conform to any given standard of appearance.

We find no error in the record, hence the order denying a new trial must be and hereby is affirmed.



KOEHLER & HINRICHS MERCANTILE COMPANY v.  
ILLINOIS GLASS COMPANY.<sup>1</sup>

July 25, 1919.

No. 21,334.

**Contract — mutual concurrent promises.**

1. Mutual concurrent promises incorporated in a bilateral contract furnish a sufficient consideration for each other.

**Sale — validity recognized by acts of parties.**

2. The parties to an executory contract for the sale of goods may recognize its binding effect by their conduct so that it is no longer open to question on the ground that it lacks mutuality.

**Same — enforcement of option to increase quantity.**

3. If a party holding an option under a contract has bought his option for value paid or absolutely agreed to be paid, he may enforce it. This rule applies to a contract of sale giving to the buyer the privilege of increasing the quantity of goods specified in the contract as much as he may desire during the period covered by the contract.

**Same — contract assignable.**

4. A contract to sell and deliver goods may be assigned by the person to whom the goods are to be delivered, if there is nothing in its terms manifesting the intention of the parties that it shall not be assignable, but the rights arising out of a contract cannot be transferred if they involve a relation of personal confidence conferring rights intended to be exercised only by him in whom confidence is reposed. Under this rule a contract of sale is assignable, if it provides that the seller may require the buyer to pay cash or give satisfactory security before making delivery of the goods.

**Same — assignment — estoppel.**

5. Even though a contract of sale is not assignable, the parties may consent to its assignment or become estopped by their conduct from asserting that it was not assignable.

Action in the district court for Ramsey county to recover \$1,993.70 for breach of contract. The answer set up as defenses: (1) That the carloads of flasks ordered by plaintiff were not for resale in the usual

<sup>1</sup>Reported in 173 N. W. 703.

course of business, but at wholesale in the Chicago market for speculation; (2) that plaintiff failed to notify defendant whether it accepted the terms of payment and credit demanded by defendant, the flasks requiring to be specially manufactured with plaintiff's trade-mark and unsalable in the open market without involving defendant in controversy with plaintiff over the use of the latter's trade-mark; (3) that defendant could not fulfil the contract because of strikes and other causes beyond its control, as was well known to plaintiff. The case was tried before Michael, J., who made findings and ordered judgment for the amount demanded. From an order denying its motion to amend the findings and conclusions and for additional findings, or for a new trial, defendant appealed. Affirmed.

*Moore, Oppenheimer & Peterson*, for appellant.

*Edward P. Sanborn*, for respondent.

LEES, C.

This was an action to recover damages for breach of a contract of sale tried by the court without a jury. The findings were in plaintiff's favor and defendant appeals from an order denying a new trial.

Plaintiff is a dealer at wholesale in glassware, bottles, flasks and other merchandise. Its place of business is at St. Paul. Defendant is a manufacturer of glassware at Alton, Illinois, and has an agency for the sale of its goods at St. Paul. On January 9, 1915, a contract in writing between defendant and the Koehler & Hinrichs Company was executed. By its terms the former agreed to sell, and the latter agreed to buy, on or before December 31, 1916, 12 carloads of Ko-Hi flasks, at a stipulated price, shipments to be made upon specifications furnished by the buyer at least 30 days in advance of the shipping date, the final specifications to be furnished not later than October 1, 1916. Payments were to be made within 30 days after shipment with certain discount privileges. It was provided that, if the financial responsibility of the buyer became impaired or unsatisfactory to the seller, cash in advance of shipment or satisfactory security might be demanded. There was a clause reading as follows:

"It is agreed that under this contract Koehler & Hinrichs Company may have the privilege of increasing quantity as much as they may desire at price shown herein, during the period covered by this contract."

On June 6, 1916, the contract was assigned by Koehler & Hinrichs Company to Koehler & Hinrichs Mercantile Company, the plaintiff in this action. The latter was a corporation organized to succeed to the business of the former and became the owner of all its assets at that time. Prior thereto defendant had furnished and been paid for two carloads of Ko-Hi flasks. Defendant had notice of the transfer to plaintiff as early as July 1, 1916. Between that date and August 25 following, defendant furnished the plaintiff, at various times and upon its orders and specifications, one carload of flasks. They were furnished and paid for in accordance with the terms of the contract. Between August 25 and October 1, 1916, plaintiff furnished specifications and delivered orders to defendant for 13 carloads of flasks and was able and offered to pay for them in cash at the contract price before they were shipped, but defendant refused to furnish any of them. The difference between the contract price of the flasks and their market price when defendant refused to deliver them was \$1,993.70. This amount, with interest from January 1, 1917, was awarded to plaintiff.

The questions we are called upon to decide are: (1) Whether the contract was void for want of mutuality either generally or as to the flasks ordered in excess of 12 carloads. (2) Whether the contract was assignable, and, if not, whether defendant is estopped from defending on that ground.

1. The contract contains an agreement by the glass company to sell, and an agreement by the Koehler & Hinrichs Company to buy, a definite quantity of flasks at a stipulated price, payable on a day certain. It provides for delivery of the flasks upon specifications to be furnished by the buyer within a stated time, and it contains the clause we have quoted giving to the buyer the privilege of increasing the quantity of flasks.

As to the 12 carloads, it is quite clear that the promises were not all on one side, for there is an express agreement on the one hand to sell and on the other to buy. Each party could hold the other to the performance of its agreement. The promises were mutual, were made at the same time, and are incorporated in a bilateral contract. Such promises so made are a sufficient consideration for each other. 1 Dunnell, Minn. Dig. § 1758; Ellsworth v. Southern Minnesota Ry. Ex. Co. 31 Minn. 543, 549, 18 N. W. 822; Bayne v. Greiner's Estate, 118 Minn. 350, 136 N. W. 1041; Page, Contracts, § 296.

Furthermore the parties, by their acts after the contract was executed, treated it as one having mutuality of obligation. In March, 1916, the buyer sought to have it canceled. The seller offered to cancel it if paid \$500, and used this language in its letter in reply to the request for cancellation: "This contract is certainly a liability of the Koehler & Hinrichs Company in case our factory sees fit to enforce it." Later it wrote that it preferred to furnish the flasks specified in the contract at the contract price and did not wish to cancel it or release the buyer. No further attempt was made to do away with the contract, but, on the contrary, it was acted upon by the delivery to plaintiff in small lots of another carload of flasks. The conduct of the parties amounted to a practical recognition of the binding effect of the contract, insofar as the sale of 12 carloads of flasks was involved, and we decline to hold that it was void for want of mutuality.

The court found that three carloads of flasks were delivered, leaving nine to be delivered if there had been no increase in the quantity definitely specified in the contract. Thirteen carloads more were ordered but not delivered, and damages were awarded for the failure to make delivery of that quantity, the court giving effect to the option clause in the contract. It is confidently asserted in defendant's behalf that this portion of the contract is unilateral and not supported by any consideration. We have examined the authorities cited to sustain this contention, but think it is unnecessary to go beyond our own decisions in disposing of the question.

It has been before the courts on many occasions. There is some diversity of opinion concerning the principles involved and more in their application to specific cases. This court is now definitely committed to the rule that if the party holding an option under a contract has bought his option for value paid or absolutely agreed to be paid, he may enforce it. *Staples v. O'Neal*, 64 Minn. 27, 65 N. W. 1083; *Gregory Co. v. Shapiro*, 125 Minn. 81, 145 N. W. 791; *Murphy v. Anderson*, 128 Minn. 106, 150 N. W. 387; *First Nat. Bank of Hastings v. Corp. Securities Co.* 128 Minn. 341, 150 N. W. 1084; *Scott v. T. W. Stevenson Co.* 130 Minn. 151, 153 N. W. 316. The rule has been approved by the United States Circuit Court of Appeals for this circuit. *Conley Camera Co. v. Multiscope & Film Co.* 216 Fed. 892, 133 C. C. A. 96.

The rule applies to the option given to the buyer in the contract now

under consideration. It was bound to take and pay for 12 carloads of flasks. This obligation furnished the consideration not only for the seller's promise to furnish them, but also for its promise to furnish a greater quantity if ordered by the buyer in accordance with the terms of its option. The fact that some of the flasks were to be shipped to Chicago, presumably for resale at a profit in a territory not theretofore covered by plaintiff, is of no importance. The option gave the buyer "the privilege of increasing quantity as much as they may desire \* \* \* during the period covered by this contract." We find nothing in the language employed indicating that it was the purpose of the parties to limit the quantity the buyer might order to the reasonable necessities of its established trade at St. Paul.

2. The general rule is, that a contract to deliver goods may be assigned by the person to whom the goods are to be delivered, if there is nothing in the terms of the contract which manifests the intention of the parties that it shall not be assignable. *Delaware Co. Com'rs v. Diebold Safe & Lock Co.* 133 U. S. 473, 10 Sup. Ct. 399, 33 L. ed. 674; *Rochester Lantern Co. v. Stiles & P. Press Co.* 135 N. Y. 209, 31 N. E. 1018; *Northwestern C. & L. Co. v. Byers*, 133 Mich. 534, 95 N. W. 529; *Arkansas Valley Smelting Co. v. Belden Mining Co.* 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. ed. 246.

It is also the rule that everyone has the right to the benefits anticipated from the character, credit and substance of the party with whom he contracts. The rights arising out of the contract cannot be transferred, if they are coupled with liabilities or if they involve a relation of personal confidence, conferring rights intended to be exercised only by him in whom confidence is reposed. *Arkansas Valley Smelting Co. v. Belden Mining Co.* supra.

Plaintiff contends that this case falls within the scope of the first rule above stated, and defendant, that it falls within the second. If defendant undertook to furnish flasks on the credit of the buyer, there would be no doubt of the validity of its contention. But it had the right to demand cash or satisfactory security before making delivery, and the court found that plaintiff was able and offered and agreed to pay the contract price in cash before shipment was made. It is sought to overcome the force of this finding by calling attention to the fact that in making the flasks a private mould was used and that the mark

"Ko-Hi" was blown in the glass, hence defendant could not resell the flasks to the general trade, without running the risk of infringing upon plaintiff's trade-mark rights. It is said that defendant had no assurance that plaintiff would accept delivery of the flasks after it had gone to the expense of manufacturing them, and that, while it could demand cash before delivery, it could not demand it as a condition precedent to the manufacture of the flasks and might be left with them on its hands with no right to dispose of them. There would be force in this contention, but for the fact that it appears to be an afterthought on defendant's part.

The buyer named in the contract never had any credit with defendant. Nothing was ever furnished to it on any other basis than cash on delivery. After receiving notice of the assignment, Ko-Hi flasks were made and shipped to plaintiff; they were billed to it, and it paid for them. Defendant called plaintiff's attention to the fact that it had not received its financial statement. One was prepared and sent in showing net assets amounting to over \$250,000. There was no further question about plaintiff's credit. On the contrary, defendant wrote, saying that plaintiff might "depend upon our filling this order just as soon as we can" and excusing its failure to deliver on the score of labor troubles at its factory. Later on it wrote that some of the flasks had been made and others were being made and added: "We feel reasonably certain that all sizes will be completed within the next three (3) weeks."

These excerpts from defendant's letters had reference to orders other than those which furnish the subject matter of this litigation, but at no time did defendant take the stand that plaintiff had not succeeded to all the rights of its assignor under the contract.

If defendant intended to stand on its alleged right to refuse to fulfil its contract because it never consented to the assignment thereof and never waived its right to rely upon the superior credit of plaintiff's assignor, it effectually concealed its intention in the correspondence and dealings that followed the assignment. We are of the opinion that even if the contract was not assignable, that defense is no longer available and that the learned trial court correctly disposed of the case.

Order affirmed.

MARY JOHNSON, AS ADMINISTRATRIX OF THE ESTATE  
OF MYRTLE JOHNSON, DECEASED v. SWAN SMITH  
AND ANOTHER.<sup>1</sup>

July 25, 1919.

No. 21,335.

**Negligence — contributory negligence — charge to jury.**

In this action for wrongful death caused by the alleged negligent operation of an automobile in which plaintiff's intestate was riding, it is held:

(1) The charge of the court was not argumentative and properly pointed out the items of negligence pleaded, upon which alone sufficient evidence had been adduced.

(2) There was no evidence upon which to submit the defense of contributory negligence.

(3) Upon the admissions made by the defendant Swan Smith that he provided the automobile for the pleasure and recreation of the family, that the defendant Harold Smith, his minor son, was a member of the family and had the privilege of using the car whenever he desired, and the undisputed evidence that plaintiff's intestate was a guest at defendants' home, and was being taken from an entertainment to her home, at the time of the accident, with the acquiescence of Swan Smith, the court did not err when instructing the jury that if they found the son liable they should also find the father liable.

Action in the district court for Ramsey county to recover \$7,500 for the death of plaintiff's intestate. The case was tried before Dickson, J., and a jury which returned a verdict for \$2,250. From an order denying their motions for a new trial, defendants took separate appeals. Affirmed.

*Hoke, Krause & Faegre and R. F. Merriam*, for appellants.

*Samuel A. Anderson*, for respondent.

HOLT, J.

Plaintiff's intestate died from an injury received when an automobile in which she was riding overturned through the alleged negligence of

<sup>1</sup>Reported in 178 N. W. 675.

the driver thereof, the defendant Harold Smith, the minor son of defendant Swan Smith. Plaintiff had a verdict. The separate motion of defendants for a new trial being denied, each took an appeal.

The short facts are these: The defendant Swan Smith lives at White Bear Lake, and conducts a machine shop in St. Paul. At the time of the accident, his son Harold, 17½ years old, lived with his father and worked in the shop. The father had bought a Ford automobile a year or two prior thereto. This automobile was purchased and kept for business and pleasure. Harold was usually the driver, and had been given the right to use the automobile whenever he desired. Myrtle Johnson, plaintiff's intestate, became well acquainted with Harold during the summer of 1917. On November 11, 1917, she was a guest at the home of the defendants. Swan Smith was there. In the evening Harold and Myrtle went to an entertainment in St. Paul, from which it was intended that Myrtle should be conveyed to her home in Stillwater. The record indicates that Swan Smith knew of the plans of the young people, and that he did not disapprove. On the way to Myrtle's home, near the city limits of Stillwater, Harold, who was not very familiar with the surroundings, kept looking to the side of the road for a fence which was an indication to him of the street where he was to turn off. Thus occupied he got over to the left side of road, and was suddenly confronted with a team headed towards him. He turned sharply to the right, then to the left to avoid going into the ditch. The turns were too abrupt for the speed of the car. It overturned. Myrtle was thrown out, fracturing the skull at the base of the brain. The injury ultimately proved fatal. Harold admits he was going about 25 miles per hour when the turns were attempted. The road was wide and in good condition, but it was night and neither the street lights nor the automobile lights disclosed the team to Myrtle or Harold until so near that a collision was imminent. Without going more into details, the facts above recited make clear that the question of Harold's negligence was for the jury, and there is no contention to the contrary in the brief or oral argument of appellants.

There is a claim that the charge bearing upon the alleged negligence of the driver of the car was argumentative and singled out particular items of evidence. We do not sustain the claim. It was not improper to draw the attention of the jury to the items of evidence upon which



negligence of the driver was to be predicated, if at all, namely, the speed of the car, and its being on the wrong side of the roadway. The law governing these matters was given in the language of the statute and we fail to see wherein it was not applicable to the facts of the case.

No evidence is found justifying the submission of the alleged defense of Myrtle's contributory negligence. She was the first to observe and give warning of the horse or rig in the road.

The main contention is that the court erred in refusing to submit the defendant Swan Smith's liability to the jury under appropriate instructions. The charge given was that, if the negligence on the part of Harold proximately caused Myrtle's death, plaintiff was entitled to a verdict against both defendants. Swan Smith testified that he bought and kept the car partly for business use and partly for the pleasure of the members of the family, including Harold, and that Harold was privileged to take and use it whenever he desired. On this occasion Swan Smith was at home when Myrtle was entertained as a guest, and apparently knew and acquiesced in her entertainment by Harold.

This court stands committed to the rule that, where the head of the family makes it his business to provide recreation and pleasure for the family and its several members and to that end furnishes an automobile, he is responsible for its negligent use by any one of the family having his permission to drive it. *Ploetz v. Holt*, 124 Minn. 169, 144 N. W. 745; *Kayser v. Van Nest*, 125 Minn. 277, 146 N. W. 1091, 51 L.R.A. (N.S.) 970; *Jensen v. Fischer*, 134 Minn. 366, 159 N. W. 827; *Uphoff v. McCormick*, 139 Minn. 392, 166 N. W. 788; *Johnson v. Evans*, 141 Minn. 356, 170 N. W. 220. The same rule has been applied in *Denison v. McNorton*, 228 Fed. 401, 142 C. C. A. 631; *Crittenden v. Murphy* (Cal. App.) 173 Pac. 595; *Hutchins v. Haffner* (Colo.) 167 Pac. 966, L.R.A. 1918A, 1008; *Lemke v. Ady*, — Iowa —, 159 N. W. 1011; *Stowe v. Morris*, 147 Ky. 386, 144 S. W. 52, 39 L.R.A. (N.S.) 224; *Farnham v. Clifford*, 116 Me. 299, 101 Atl. 468; *Lewis v. Steele*, 52 Mont. 300, 157 Pac. 575; *Boes v. Howell*, 24 N. M. 142, 173 Pac. 966, L.R.A. 1918F, 288; *McNeal v. McKain*, 33 Okl. 449, 126 Pac. 742, 41 L.R.A. (N.S.) 775; *Davis v. Littlefield*, 97 S. C. 171, 81 S. E. 487; *King v. Smythe*, 140 Tenn. 217, 204 S. W. 296, L.R.A. 1918F, 293; *Birch v. Abercrombie*, 74 Wash. 486, 496, 133 Pac. 1020, 50 L.R.A. (N.S.) 59; *Hiroux v. Baum*, 137 Wis. 197, 118 N. W. 533, 19 L.R.A. (N.S.) 332.

That the father who has provided an automobile for the pleasure of the family is not liable under the rule of master and servant or principal and agent for the negligent operation of the car by a member of the family, competent to drive, who is permitted to take it for his exclusive pleasure or purpose is held in *Parker v. Wilson*, 179 Ala. 361, 60 South. 150; *Watkins v. Clark*, 103 Kan. 629, 176 Pac. 131; *Woods v. Clements*, 113 Miss. 720, 74 South. 422, L.R.A. 1917E, 357; *Hays v. Hogan*, 273 Mo. 1, 200 S. W. 286, L.R.A. 1918C, 715, Ann. Cas. 1918E, 1127; *Doran v. Thomsen*, 76 N. J. Law, 754, 71 Atl. 296, 19 L.R.A.(N.S.) 335, 131 Am. St. 677; *Van Blaricom v. Dodgson*, 220 N. Y. 111, 115 N. E. 443, L.R.A. 1917F, 363; *McFarlane v. Winters*, 47 Utah, 598, 155 Pac. 437, L.R.A. 1916D, 618; *Blair v. Broadwater*, 121 Va. 301, 93 S. E. 632, L.R.A. 1918A, 1011. *Winn v. Haliday*, 109 Miss. 691, 69 South. 685, and *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761, hold the father liable where a member of his family, in conveying other members or guests, causes injury through negligent operation of the car.

The reasons for fixing responsibility under the master and servant or principal and agent rule seem clear enough, where the family automobile is used for the pleasure or convenience of other members of the owner's family than the driver, but appear to the writer somewhat doubtful when the driver, it may be an adult son or daughter, uses the car for his or her own purpose exclusively. However, unless *Kayser v. Van Nest*, *supra*, and *Johnson v. Evans*, *supra*, are to be overruled, the learned trial court correctly advised the jury when instructing them to return a verdict against the father if plaintiff was entitled to one against the son, for the father frankly admitted that he provided the car for the pleasure of the family, that Harold was one of the family, and had the liberty to use the car for recreation and pleasure whenever he saw fit. The one who provides an automobile for the pleasure and indiscriminate use of the younger members of his family should not be lightly absolved from responsibility. It may also be said that, if responsibility attaches to the man who keeps an automobile for the recreation of his family when injury results from its negligent operation while used by two or more members of the family for a pleasure drive, it is difficult to see why the same responsibility does not attach when a single member of the family so uses it. To make use of an automobile for the pleasure of any of the family, a driver is essential, and, whether this be a hireling

or a son, should be regarded as the servant of the owner of the automobile.

Our conclusion is that the orders should be affirmed.

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ALBERT AABERG v. MINNESOTA COMMERCIAL  
MEN'S ASSOCIATION.<sup>1</sup>

July 25, 1919.

No. 21,346.

**Mutual benefit insurance — exclusion of documentary evidence.**

1. Plaintiff was insured by defendant against disability resulting from accidental injuries and sued on the contract. Defendant had issued to him a certificate of membership which contained none of the substantive provisions of the contract, but stated that his application and the by-laws constituted the contract. No other policy was issued. Plaintiff put his certificate of membership in evidence, and proved the provision of the application and the by-law which included the part of the contract on which he relied to establish his cause of action, but on his objection the court excluded the remainder of the application and the remainder of the by-laws which included the part of the contract on which defendant relied to establish its defense. *Held* error.

**Same — pleading and proof.**

2. Plaintiff's claim that this evidence was not admissible under the pleadings cannot be sustained.

**Same — health and accident insurance — statute.**

3. Chapter 156, Laws of 1913, established a complete code regulating health and accident insurance, and excluded that class of insurance from the operation of section 3292, G. S. 1913, under which the proffered evidence was excluded.

**Same — meaning of word "policy" in statute.**

4. The word "policy" as used in the statute usually refers to the written instrument in which the contract of insurance is embodied. The certificate, the application and the by-laws constitute the only contract contemplated by the parties in the present case and is the only existing contract.

<sup>1</sup>Reported in 173 N. W. 708.

**Same — contract valid.**

5. This contract violates the provisions of chapter 156, but is valid by virtue of section 9 of that act (section 3530, G. S. 1913), and must be given effect as provided in that section.

**Same — evidence admissible.**

6. By proving the provisions of the application and by-laws on which his cause of action rested, plaintiff gave defendant the right to prove the provisions of these documents on which its defense rested, even if defendant would not have had this right otherwise.

**Same — health and accident insurance.**

7. Defendant is not within section 3536, G. S. 1913, as its membership is not confined to traveling salesmen.

Action in the district court for Hennepin county to recover \$1,353.70 indemnity under plaintiff's certificate of membership in defendant corporation. The material allegations of the answer are set out in the opinion. The case was tried before Hale, J., who at the close of the testimony granted plaintiff's motion to withdraw from the consideration of the jury the issues as to false representations alleged to have been made by plaintiff in answer to certain questions of the application, upon the ground that there was no evidence to go to the jury as to their falsity, and denied defendant's motion for a directed verdict. The jury returned a verdict for the full amount demanded. From an order denying its motion to reduce the amount of the verdict to one-half thereof and denying its motion for judgment in favor of defendant notwithstanding the verdict, or for a new trial, defendant appealed. Reversed.

*Rieke & Hamrum and Lancaster & Simpson, for appellant.*

*W. C. & W. F. Odell, for respondent.*

**TAYLOR, C.**

Defendant is a corporation organized under the laws of Minnesota for the purpose of giving its members "conservative and reasonable Health, Accident and Specific Benefit insurance on a mutual plan." Its membership is limited to men engaged in commercial and professional pursuits, and is composed mainly of traveling salesmen. When a member is accepted, it issues to him a certificate of membership which states that his application and the by-laws constitute his contract of insurance. The by-laws provide for several forms of insurance and the

applicant is required to designate in his application the particular form which he desires. Plaintiff made an application designating accident insurance as the form he desired. His application was accepted and defendant issued to him the following certificates:

No. 13540

Minnesota Commercial Men's Association.

This is to certify that Albert Aaberg is a member of the Minnesota Commercial Men's Association and is entitled to protection as applied for in his application for membership, subject to the provisions and stipulations of the By-laws of the said Minnesota Commercial Men's Association, which Application and By-laws constitute the Contract Between the said Minnesota Commercial Men's Association and the member above mentioned; and subject, further, to any and all additions, extensions and changes of the said By-laws as they may in the future be created and amended by the members in annual meeting.

"In Witness Whereof the said Minnesota Commercial Men's Association has caused its Corporate Seal to be hereunto affixed, and these presents to be signed by its President and Secretary on this First day of February, 1915.

Seal

G. W. Barnes, President.

A. J. Alwin, Secretary.

While riding in a buggy the team became unmanageable and plaintiff was thrown out and injured. Alleging that he had been totally disabled for a period of 54 weeks by the injuries sustained, he brought suit on the insurance contract to recover the maximum indemnity of \$25 per week for that period. The jury returned a verdict for the full amount claimed. Defendant appealed from an order denying a motion in the alternative for judgment notwithstanding the verdict or for a new trial.

In its answer defendant alleged that the application of plaintiff and the by-laws of defendant constituted the contract between the parties; that the contract stipulated that certain specified representations in the application were warranted to be true, and that the contract should be void and of no effect if they were not true; that these representations were false and that the contract never became of force or effect for that

reason; that the contract further stipulated that defendant should be released from liability thereunder, if plaintiff took out additional accident insurance without notifying defendant thereof; that plaintiff took out additional accident insurance of which he gave defendant no notice and thereby released defendant from liability; that the contract further stipulated that, if any difference should arise at any time respecting the validity or adjustment of any claim thereunder, it should be submitted to arbitrators as provided therein, and that such submission to arbitrators should be a condition precedent to the right to maintain a suit in court; that this provision had never been waived by defendant, and that plaintiff had made no attempt to comply with it. The answer also contained a general denial and raised an issue as to the extent of plaintiff's disability, the length of time it continued, and the amount to which he would be entitled under the contract if it was in force.

At the trial plaintiff, after offering in evidence his certificate of membership, offered in evidence section 7 of the by-laws. This section prescribes the indemnity to which a member having accident insurance is entitled for disabilities resulting from accidental injury. Defendant's objection that this section constituted only a part of the contract and that the entire contract should be offered was overruled. Later defendant offered in evidence the application and the other by-laws as constituting the remainder of the contract. They were excluded, on the ground that not being attached to the certificate of membership they were not a part of the contract. The court held that defendant was precluded by the law from proving those provisions of the application and by-laws on which it based its defense and whether this ruling was correct is the principal question presented.

At the trial the court withdrew the issue of fraud from the jury, on the ground that the evidence would not justify a finding of fraud. The case is brought here on a bill of exceptions which does not contain the evidence on the issue of fraud, and therefore the ruling withdrawing that issue from the jury is not presented for review. Plaintiff contends that the defenses based on the alleged violation of the contract in taking out additional insurance without notifying defendant, and in bringing suit without offering to submit the claim to arbitration, are not sufficiently alleged in the answer to permit defendant to introduce evidence in support of them. We are unable to sustain this contention. The

answer sets forth the provisions of the contract relating to these matters and that plaintiff failed to comply with such provisions in the respects stated therein. Furthermore the proffered evidence was not excluded as inadmissible under the pleadings, no such objection was made at the trial or passed upon by the trial court.

Defendant unquestionably had the right to prove the entire contract, unless barred from doing so by the statutes regulating the business of insurance. G. S. 1913, § 3292, provides:

"A statement in full of the conditions of insurance shall be incorporated in or attached to every policy, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty or a part of the contract, except insofar as they are so incorporated or attached."

This is a general provision applicable to all classes of insurance companies or associations which are not excepted therefrom by other provisions of the statutes, and is the provision on which plaintiff relies as justifying the rulings of the court.

Chapter 156, p. 181, of the Laws of 1913 established a complete code regulating and governing health and accident insurance, and repealed all acts and parts of acts inconsistent therewith. This act constitutes sections 3522 to 3535, inclusive, of the General Statutes of 1913. Section 3523 provides that no health or accident policy shall be issued or delivered, unless it complies with six requirements specified in that section. Section 3524 provides that every such policy issued shall contain fifteen "Standard Provisions" set forth in full in that section. Section 3525 provides that no such policy shall be issued or delivered which contains any provisions relative to certain matters specified therein, unless such provisions are in the words set forth in that section and designated therein as "Optional Standard Provisions," but gives the insurer the right to omit any such provision from the policy. Section 3526 provides:

"No such policy shall be so issued or delivered if it contains any provision contradictory, in whole or part, of any of the provisions hereinbefore in this act designated as 'Standard Provisions' or as 'Optional Standard Provisions,' nor shall any indorsements or attached papers vary, alter, extend, be used as a substitute for, or in any way conflict with any of the said 'Standard Provisions' or the said 'Optional Standard Provisions,' nor shall such policy be so issued or delivered if it contains

any provision purporting to make any portion of the charter, constitution or by-laws of the insurer a part of the policy unless such portion of the charter, constitution or by-laws shall be set forth in full in the policy."

Section 3530 provides:

"A policy issued in violation of this act shall be held valid but shall be construed as provided in this act and when any provision in such a policy is in conflict with any provision of this act the rights, duties and obligations of the insurer, the policyholder and the beneficiary shall be governed by the provisions of this act."

Section 3533 excepts from the operation of the act certain sorts of insurance not involved herein. Section 3536, G. S. 1913, which was chapter 410, p. 608, of the Laws of 1913, and was passed subsequent to chapter 156 provides:

"Any domestic assessment, health and accident insurance association now licensed to do business in this state which confines its membership to commercial travelers and which does not pay commissions or other compensation for securing new members shall be exempt from the provisions of law relating to the form and contents of policies of health and accident insurance when approved by the commissioner of insurance."

We cannot sustain defendant's claim that the manner in which it conducted its business was authorized by section 3536. While defendant may have shown itself to be within the provisions of section 3536 in all other respects, it did not confine its membership to commercial travelers, and therefore that section did not exempt it from the provisions of the law relating to the form and contents of policies of health and accident insurance. Chapter 183, p. 265, Laws of 1917, extended this section sufficiently to include the defendant, but was not passed until after this suit had been begun.

It is beyond question, therefore, that the contract in controversy is governed by the act relating to health and accident insurance. This act covers the entire subject and manifests an intention on the part of the legislature to make the law regulating and governing this class of insurance complete in itself, except as otherwise expressly provided therein. It repeals all acts or parts of acts inconsistent with it. It was enacted long after section 3292 on which plaintiff relies. It contains provisions in respect to the policy and the effect to be given to



the contract inconsistent with that section, and in our opinion was intended to and does exclude health and accident insurance from the operation of that section. A somewhat similar situation in respect to fraternal beneficiary associations was considered in *Louden v. Modern Brotherhood of America*, 107 Minn. 12, 119 N. W. 425, and a similar conclusion was reached.

"A policy is, properly speaking, a contract to indemnify the insured in respect to some interest which he has, against the perils to which he considers that it will be liable. Also, the formal written instrument in which the contract of insurance is usually embodied is known as the policy." 22 Am. & Eng. Enc. (2d ed.) 941.

The word "policy" has two well understood meanings in insurance law, but as used in the statute it usually refers to the written instrument in which the contract of insurance is embodied. 6 Words & Phrases, 5440.

The certificate of membership issued to plaintiff is in no sense a policy of insurance. It does not purport to contain any of the substantive terms of the contract, but states that his application and the by-laws constitute the contract. Unless the application and by-laws are included with the certificate of membership as constituting the policy, there is no policy whatever. These documents constitute the only contract and only policy contemplated by the parties. They do not conform to the statute, but section 3530 provides that a policy issued in violation of the statute shall be held valid, and that, where any provisions therein contravene the provisions of the statute, the provisions of the statute shall govern. It follows from this section that the contract of insurance was valid and must be given effect, but that the provisions of the statute must be substituted for those of the contract insofar as the two conflict. Section 3525 contains an "Optional Standard Provision" relative to the taking of additional insurance without giving written notice to the insurer which provides that in such case:

"The insurer shall be liable only for such portion of the indemnity promised as the said indemnity bears to the total amount of like indemnity in all policies covering such loss, and for the return of such part of the premium paid as shall exceed the pro rata for the indemnity thus determined."

This provision conflicts with the provision in the contract and must

be substituted therefor. We find no provision in the statute conflicting with the provision in the contract relative to arbitration and consequently that provision is in force.

Proving his certificate of membership and his injuries did not give plaintiff any cause of action whatever. In order to establish a cause of action of any sort he was compelled to prove at least a portion of the application and a portion of the by-laws. As he proved parts of these documents to establish the obligation of defendant to indemnify him for his injuries, he was not in position to object to the reception in evidence of such remaining parts of these same documents as formed a part of the contract on which he relied, or related to the validity and extent and the manner of enforcing the obligation which he was asserting. By presenting this proof, he gave defendant the right to put other pertinent provisions of the application and by-laws in evidence, even if they would otherwise have been barred, and excluding them was reversible error.

Defendant questions the correctness of the explanation given by the court as to what would constitute total disability under the contract. As there must be a new trial on other grounds, it is sufficient to say that the rule applicable is elucidated in *Lobdill v. Laboring Men's Mutual Aid Assn.* 69 Minn. 14, 71 N. W. 696, 38 L.R.A. 537, 65 Am. St. 542.

Order reversed.

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J. S. GANLEY AND OTHERS v. CITY OF PIPESTONE AND OTHERS.

NEW AMSTERDAM CASUALTY COMPANY, APPELLANT.<sup>1</sup>

July 25, 1919.

No. 21,870.

**Pleading — cross-complaint by surety on contractor's bond.**

Action for balance of contract price on paving contract between partnership and defendant city. Answer by surety on contractor's bond. Motion made one year later by surety to permit it to file cross-complaint to include another paving contract between a corporation with the same

<sup>1</sup>Reported in 173 N. W. 559.

name as the partnership and defendant city. Motion denied because a new cause of action would be brought into the case which would delay the trial over the next regular term. *Held*: No abuse of discretion on the part of the trial court. [Reporter.]

Action in the district court for Pipestone county to recover a balance of \$10,992.92 upon a contract. From an order, Nelson, J., denying its motion to serve a cross-complaint, defendant New Amsterdam Casualty Company appealed. Affirmed.

*Kerr, Fowler, Schmitt & Furber* and *O. N. Davies*, for appellant.  
*Morris Evans* and *C. T. Howard*, for respondents.

PER CURIAM.

This is an appeal by defendant casualty company from an order denying its application for permission to serve and file a cross-complaint.

It appears from the plaintiff's complaint that on July 13, 1916, plaintiffs, as copartners under the firm name of Ganley Construction Company, entered into a contract with the city of Pipestone to do certain paving in that city and furnish all the labor and material required therefor for the sum of \$55,264.42; that they gave the statutory bond to secure the performance of the contract and the payment of all just claims for labor and material with defendant casualty company as surety thereon; that they have fully performed their contract; that the city has paid them the sum of \$43,288.13 only, and refuses to pay the remainder of the contract price until plaintiffs pay various claims asserted against them by third parties; that these third parties are made defendants; that some of these third parties claim an interest in the balance of the contract price remaining unpaid; that some, but not all, of these third parties claim to have furnished labor and material for the work; that plaintiffs did not incur and are not liable for certain of these claims, and that defendant casualty company is liable on its bond for all just claims for labor or material furnished for the work which plaintiffs fail to pay. The relief asked is that the several claimants be required to prove their respective claims; that the casualty company be required to defend against any claims for which it denies liability; that the court give to each and all of the parties such relief as may be equitable and

just, and that plaintiffs have judgment against the city for the unpaid part of the contract price.

In its answer the casualty company admitted liability for all just claims for labor or material furnished for the work which plaintiffs should fail to pay, and further admitted and alleged that plaintiffs had fully performed their contract; that defendant city retained and refused to pay plaintiffs a large amount due and payable to them under the terms of the contract; that the several parties designated therein asserted claims against plaintiffs, and that the company had no knowledge or information sufficient to form a belief as to the existence or validity of any of such claims. The casualty company asked that the city be required to pay plaintiffs whatever amount should be determined to be due under the contract, and that plaintiffs be required to apply the same in payment of such claims as the court should find to be valid.

The action was commenced in December, 1917. In December, 1918, a year later, the casualty company applied for leave to serve and file a cross-complaint. From the proposed cross-complaint it appears, among other things, that on July 13, 1916, the Ganley Construction Company as a copartnership entered into the contract set forth in the plaintiffs' complaint; that sometime in the year 1917 a corporation was organized under the name of "Ganley Construction Company;" that on August 20, 1917, this corporation entered into a contract with the city of Pipestone to do certain paving therein not included in the contract with the copartnership, and that the casualty company is surety for the corporation on this contract as well as for the copartnership on the other contract, and desires to have all the claims and controversies arising under both contracts settled and determined in this action. The court denied the application, on the ground that the trial had already been postponed two or more times since the cause was at issue, and that the cross-complaint, if admitted, would bring a new and separate cause of action into the case, and would result in carrying it over the next regular term of court which opened two weeks later.

We find no abuse of discretion in the ruling and it is affirmed.

JOHN WALSO AND ANOTHER v. OLIVER F. LATTERNER.<sup>1</sup>

July 25, 1919.

No. 21,372.

**Trust — deposit in savings bank — presumption.**

1. Where a depositor makes a deposit in a savings bank of his own money in his own name in trust for a relative and dies before the beneficiary without doing any decisive act to disaffirm the trust, a presumption arises that an absolute trust was created as to the balance remaining on deposit at the death of the depositor.

**Same — evidence insufficient to overcome presumption.**

2. The fact that the depositor had deposited in his personal account the maximum amount permitted by the bank before making this deposit, and that he could withdraw this deposit during his lifetime, and did withdraw a part of it, unaided by other evidence, is not sufficient to overcome this presumption.

**Same — evidence of mental competency.**

3. The facts stated by the nonexpert witnesses as a basis for their opinions, did not tend to show that the depositor was incompetent to transact business and their opinions as to his competency were properly excluded.

After the first appeal reported in 140 Minn. 455, 168 N. W. 353, the case was tried before Hale, J., and a jury which returned a verdict for defendant. From an order denying their motion for a new trial, plaintiffs appealed. Affirmed.

*George S. Grimes and John Walso*, for appellants.

*Benton & Morley*, for respondent.

TAYLOR, C.

On April 8, 1911, Thomas J. Latterner deposited \$5,000 in the Farmers and Mechanics Savings Bank of Minneapolis in his own name "in trust for Oliver F. Latterner." He died on December 26, 1915. Shortly after his death the bank pass book was delivered to Oliver who presented it to the bank and drew out the money. Plaintiffs, as administrators of

<sup>1</sup>Reported in 173 N. W. 711.

the estate of Thomas J. Latterner, brought this action to recover the money from Oliver, on the ground that it was the property of Thomas at his death and belonged to his estate. The action has been tried twice. At the first trial the court directed a verdict for the plaintiffs. On appeal by defendant, this court granted a new trial and the opinion written by the late Justice Bunn explains fully and clearly the rules of law governing "savings-bank trusts." *Walso v. Latterner*, 140 Minn. 455, 168 N. W. 353. The second trial resulted in a verdict for the defendant, and an appeal by plaintiffs brings the case again before this court.

At the second trial plaintiffs insisted that Thomas did not intend to create a trust in favor of Oliver, and that he was not of sufficient mental capacity at the time he made the deposit to understand and comprehend the nature and effect of the transaction. The court, in an early part of the charge, discussed the question of intent as if intending to submit that question to the jury, but closed the charge as follows:

"If you find that he was of sufficient capacity, and understood what he was doing in making this transaction, there being no evidence to show that he revoked it, you will find a verdict for the defendant. Upon the other hand, if you find that he was not competent, and did not understand this transaction, did not appreciate it or understand it, then you will find a verdict for the plaintiff."

Plaintiffs contend that the evidence disclosed facts on which the jury could have found that Thomas did not intend to create a trust in favor of Oliver and that this charge, which in effect took that question from the jury and determined it as a matter of law, was error.

There was affirmative evidence tending to show a motive for creating this trust, and also tending to show that Thomas intended to create it and understood that he had done so. There is no affirmative evidence to the contrary. The facts from which plaintiffs would have the jury draw a contrary inference are the following: The regulations of the bank fixed the sum of \$5,000 as the maximum amount which could be deposited in any one account, but if he desired to do so, a depositor could carry a personal account in his own name, could also carry an account in his own name in trust for another, and could deposit the maximum of \$5,000 in each of these accounts. In case he made a deposit in his own name in trust for another, the provisions governing such trusts and printed in the pass book issued to him for such deposits, per-

mitted him to withdraw it at any time during his lifetime, but provided that at his death the amount then on deposit should be paid to the beneficiary in the absence of written instructions making a different disposition of it. Thomas had carried a personal account in this bank for some years. At the time of making the deposit in question he had received something over \$9,000 from the sale of a tract of land. He deposited \$3,600 in his personal account which brought that account up to the maximum of \$5,000 and then deposited \$5,000 in his own name in trust for Oliver. During his lifetime he withdrew \$85 from the trust fund in small amounts, a small part of the accumulated interest. Plaintiffs urge that the jury might have inferred from these facts that Thomas deposited the money in trust because he could not place it in his personal account, and not for the purpose of making a provision for Oliver.

The rule governing so-called "savings-bank trusts," quoted from the New York court in the opinion on the former appeal,<sup>1</sup> after defining the right of the depositor to withdraw the deposit or revoke the trust in his lifetime, states:

"In case the depositor dies before the beneficiary, without revocation or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor."

There is no evidence tending to show a revocation or any act of disaffirmance on the part of Thomas. The provisions governing the trust were not only printed in the pass book which Thomas received when he made the deposit, but were explained to him at that time by the officer of the bank who issued the pass book, and there is also evidence of subsequent statements made by him, tending to show that he understood and expected that the money would eventually go to Oliver. It is proper to note that some of the evidence at this trial was not presented at the first trial.

We think that the presumption that Thomas intended the trust to be given effect according to its terms at his death has not been overcome; that the facts pointed out by plaintiffs would not justify the jury in conjecturing that Thomas made the deposit in the form of a trust merely as a matter of convenience without intending the money to go to Oliver, and that withdrawing the question of intent from the jury was not error.

The finding of the jury that at the time he created the trust Thomas

<sup>1</sup>[140 Minn. 458, 68 N. W. 358.]

possessed sufficient mental capacity to understand and comprehend the nature and effect of his act, is amply supported by the evidence, and the only remaining question requiring consideration is whether the court erred in excluding the opinions of three nonexpert witnesses offered for the purpose of showing lack of such mental capacity, and in charging the jury that the testimony of Doctor Eitel that in his opinion Thomas was not competent to transact business, was the only testimony in the case which would warrant them in finding that Thomas was incompetent.

Each of the three nonexpert witnesses had known Thomas for many years. Each was asked whether in his opinion, based on his knowledge and observation, Thomas was competent to transact ordinary business in 1911. The court excluded these questions on the ground that no proper foundation had been laid for them. The facts and circumstances stated by each of the three witnesses as the basis for his testimony were substantially the same. Plaintiffs, in their brief, say:

"They each testified in effect that during 1911 he (Thomas) could not carry on an intelligent or connected conversation on any subject."

This is the only statement of any of these witnesses urged by plaintiffs in their brief as tending to show incompetency on the part of Thomas. They each stated if they began talking with him on a given subject, he would soon change to another subject, but do not go to the extent of saying that he failed to comprehend what was said to him or failed to express whatever thought he wished to convey. They further stated that he was peculiar; that if they wished to buy any of his products it was difficult to get him to agree to sell or to fix a price, unless the matter was brought up in such a way as to induce him to make a proposition himself; that when he made a sale he always insisted on having his pay at that time and was careful to see that he gave the exact quantity and no more, and that he always secured fair prices for whatever he sold.

Whether a sufficient foundation has been laid for admitting the opinion of a nonexpert witness as to mental incompetency is for the trial court to determine in the exercise of a reasonable judicial discretion, and we are of opinion that the court did not overstep the bounds of its discretion in holding that the facts above outlined failed to constitute a sufficient foundation for the admission of the opinions of these witnesses. See 1 Dunnell, Minn. Dig. § 3316; Scott v. Hay, 90 Minn. 304, at page 312,



97 N. W. 106. We are also of opinion that the court was justified in holding that such facts did not tend to show that Thomas lacked sufficient mental capacity to determine the disposition which he wished to make of his property.

Order affirmed.

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P. A. NELSON, AS FATHER OF AND FOR THE BENEFIT  
OF ISABEL NELSON, A MINOR v. ROBERT C.  
FARRISH AND ANOTHER.<sup>1</sup>

August 1, 1919.

No. 21,245.

**Physician and surgeon — malpractice — charge to jury.**

1. Action for malpractice in treatment of a child afflicted with osteomyelitis in the radius. It appears that the proper treatment was by operation. The court instructed the jury that, if defendants made a correct diagnosis and advised an operation and it was refused, defendants were not liable, that if they failed to diagnose and treat the child with reasonable skill, and such failure resulted in injury, they were liable for damages. Under the evidence the instruction was proper. The question whether plaintiff had proven that a better result would have followed an operation was in the case. The evidence is such as to sustain a verdict for defendants.

**Liability of physician called only on particular occasions.**

2. A physician, if called generally, must give continued attention as the condition of the patient requires; if called only for an occasion, he owes no duty to repeat his visit or continue his treatment. The evidence shows that defendant Portmann was called for particular occasions only. This did not affect his liability for what occurred on the occasions of his visits, but concerned only the question whether he owed a duty to give continued attendance. He was not liable for what was done by others during his absence.

**Evidence of malpractice insufficient.**

3. The evidence produced was insufficient to make a case for the jury as to malpractice in the manipulation of the arm.

**Appeal and error — exclusion of evidence insufficient for reversal.**

4. The rejection of evidence will not warrant a reversal, unless its

<sup>1</sup>Reported in 173 N. W. 715.

admission might reasonably have resulted in a different verdict. The exclusion of certain evidence in this case was not reversible error.

**Liability of defendant for son's acts immaterial.**

5. Defendant Portmann's son treated the child on occasions and performed an operation. There is no claim of malpractice on his part, and it is immaterial whether defendant Portmann was answerable for his acts.

**Assignments of error.**

6. Other assignments of error are considered and held to present no ground for reversal.

Action in the district court for Martin county to recover \$20,000 for malpractice. The separate answers alleged negligence on the part of the minor and her parents, and that their negligence contributed to and caused any disease with which the minor suffered. The case was tried before Tift, J., who when plaintiff rested denied defendant Farrish's motion to dismiss the action as to him, and a jury which returned a verdict in favor of defendants. From the order denying his motion for a new trial, plaintiff appealed. Affirmed.

*Wilson Borst, Albert R. Allen and Leo J. Seifert, for appellant.*

*Dunn & Carlson, Knox & Faber and Moore, Oppenheimer & Peterson, for respondents.*

**HALLAM, J.**

Plaintiff sues as father of Isabel Nelson, 8 years old, for malpractice. Plaintiff resides at Sherburn. On November 11, 1915, Isabel was suffering from osteomyelitis in the radius, a disease of the marrow of the bone. On the twelfth defendant Farrish, a physician of Sherburn, was called to treat the case and he continued to treat it until December 3. The disease grew worse. On November 18, defendant Portmann, a physician of Jackson and former family physician, was called. He attended with Dr. Farrish, examined the arm, and gave directions as to treatment. He did not take full charge of the case, was apparently not expected to return unless called, and, when he left, gave directions that if they "needed him any more to call him." On the twenty-second Dr. Portmann was called again. He came. Dr. Farrish also was present. Dr. Portmann gave some directions as to treatment, but did not come again,

and apparently was not expected to come without being called. Dr. Farrish continued to treat the arm. It continued to grow worse and on December 2 Dr. Portmann was again sent for. He was not at home, and, instead, his son Dr. U. V. Portmann came. On December 3 he took the child to a hospital at Jackson, where he and defendant Portmann performed an operation the next day. Dr. Farrish's employment then ceased. In January the parents took the child to St. Joseph's Hospital in St. Paul. There, Dr. Schwyzer performed an operation in the presence of defendant Portmann, and found it necessary to remove the radius, and this was done.

1. It is conceded by all that the proper treatment for osteomyelitis is by operation, consisting in opening the shaft of the bone and affording drainage of the pus and removal of diseased tissue. The charge of plaintiff is that the defendants did not advise or suggest this treatment, that if this had been resorted to promptly the arm would have been saved, but that defendants did not correctly diagnose the case until the disease had progressed so far that the bone was beyond treatment and the use of the arm virtually lost. Defendants contend that they did promptly diagnose the disease and advised the parents of its true nature, and seasonably advised operative relief, and that the parents objected to any operation, until it was too late to save the arm. On this question the evidence was squarely in conflict.

The court instructed the jury that, if the defendants within a reasonable time made a correct diagnosis and clearly advised the parents of the nature of the ailment, and the importance of an immediate surgical operation, and of the result likely to follow a refusal, and that the parents refused to permit such an operation, their verdict should be for defendants, that if they failed to diagnose and treat the child with reasonable and ordinary skill and such failure resulted in the injury complained of, then defendants were liable for damages. We find no error in this instruction. *Getchell v. Hill*, 21 Minn. 464.

The court further instructed the jury that "the burden is upon the plaintiff to prove by a fair preponderance of the evidence that, notwithstanding an incorrect diagnosis and failure to advise the proper treatment, a different result would have followed, and there would have been a better recovery, if there had been an operation within a reasonable time." Plaintiff's counsel contend that the only defense is that the par-

ents refused to allow the defendants to operate and that it is conceded that an operation would have resulted in a good arm. It is true the doctors claimed that they correctly diagnosed the case, and advised an operation, and that the parents refused, and most of the evidence is devoted to those propositions, and it is true the attorney for defendant Portmann, in his brief in this court, ventures the assumption that an operation would have resulted in a good and usable arm. We are of the opinion, however, that the question whether plaintiff had proven that a better result would have followed an operation, was in the case, and that the court correctly charged the jury on this point. The jury found for defendants. We have examined the voluminous record with much care, and we are of the opinion that there was evidence sufficient to sustain the finding of the jury.

2. A number of other questions are raised. In fact there are 52 assignments of error.

Plaintiff contends that defendant Portmann was employed generally to diagnose, treat and cure, and complains that the court instructed the jury that he was called in consultation with Dr. Farrish. Under the evidence we think the court's ruling was right. However, as far as concerns his liability for what occurred on the occasion of his visits, it is not very material in which capacity he was called. He was called as a physician and surgeon to diagnose the disease and prescribe or direct treatment for its cure, regardless of what Dr. Farrish had done. While he was there he owed the duty to employ reasonable professional skill. *Walker v. Holbrook*, 130 Minn. 106, 153 N. W. 305. The court did not rule or instruct otherwise. There is no claim on his behalf that he had not ample opportunity to correctly diagnose the disease. He claims he did do so and advised the family of his diagnosis. In this connection it is pertinent to observe that there is no question but that Dr. Farrish's employment was general. Since the jury found in his favor, it is difficult to see how they could have found otherwise as to Dr. Portmann, whether his employment was general or as a consultant. In no possible view of the case could it be said that the obligation or liability of Dr. Portmann was greater than that of Dr. Farrish.

The difference between general and special employment relates mainly to the obligation of the physician to continue his attention. If called generally he must give such continued attention and attendance as the

condition of the patient requires. *Ballou v. Prescott*, 64 Me. 305; *Lawson v. Conaway*, 37 W. Va. 159, 16 S. E. 564, 18 L.R.A. 627, 38 Am. St. 17; 30 Cyc. 1573. But if called specially and only for the occasion, he owes no duty to repeat his visits or continue his treatment. We think the effect of the testimony of plaintiff's witness is that it was not expected that defendant Portmann would return, except when called, and that he owed no duty to do so, and that the court properly instructed the jury that he could only be held liable for such damages as resulted from his connection with the case on the occasion of his visits of November 18 and November 20. There is no evidence of malpractice at either of the operations later performed, at which defendant Portmann was present. Nor is there anything in the case to indicate that defendant Portmann was employed to supervise or direct defendant Farrish in his absence, and the court properly instructed the jury that he is not liable for what Dr. Farrish did or omitted to do in his absence.

3. Two days after he was first called, Dr. Farrish, for purposes of diagnosis, put the child under an anaesthetic and manipulated the arm. Plaintiff claims that up to that time the child had the use of the arm, that afterwards the arm grew worse, she could not use the arm, and it became swollen and discolored. Plaintiff claims also that, in the manipulations, Dr. Farrish broke the bone. The only evidence of fracture is that at the time of the operation at Jackson, one of the family present saw that the bone was "broken," as he stated it, near the wrist. The court excluded this evidence from the consideration of the jury. We are of the opinion that this evidence was not sufficient to show that Dr. Farrish fractured the arm. Undoubtedly during the progress of the disease the bone became "eaten loose or rotted loose at both ends" so that it was finally, at the operation at St. Paul, taken out with pincers. To a lay witness it might have the appearance of a bone broken off, but we think there was no competent evidence that the bone was broken by Dr. Farrish's manipulations. There may be more question whether the manipulation was too severe and caused the arm to swell and discolor, but we think the evidence is insufficient to make out a case of malpractice in this particular.

4. When plaintiff was testifying he stated that after the operation at Jackson Dr. Portmann said to him "that the arm was a hundred times worse than he ever looked for, and he said he damned himself a thou-

sand times over that he didn't take that girl in his own hands the time—the first time he was there to the house.” This was stricken out. Plaintiff claims it was proper evidence as an admission by Dr. Portmann of his own lack of skill and of his negligence. The evidence might properly enough have been allowed to stand. But the meaning of the language is so doubtful that we think its exclusion was not reversible error. Counsel for defendant Portmann argues that the statement, if made at all, meant that he should have overridden the objection of the parents to an operation, and this seems to us its most plausible meaning. He could hardly have meant that he should have taken her from the charge of Dr. Farrish, for there is no suggestion that Dr. Farrish did not accept and follow his advice. On the contrary, the evidence, so far as it bears on that point at all, shows that Dr. Farrish followed the treatment outlined by Dr. Portmann.

Dr. Portmann was asked on cross-examination whether he ever made any claim that either he or Dr. Farrish had advised an operation, which was refused and why he did not make such a claim on an occasion when plaintiff and his attorney called on him. This might properly have been admitted as impeachment of his testimony that he had given such advice, but it does not seem to us of such importance that its rejection should warrant a reversal. The rejection of evidence will not warrant a reversal, unless its admission might reasonably have resulted in a different verdict. *Barnes v. Spencer*, 113 Minn. 101, 129 N. W. 140; *Svensson v. Lindgren*, 124 Minn. 386, 389, 145 N. W. 116, Ann. Cas. 1915B, 734. See G. S. 1913, § 7789.

5. There is some claim that defendant Portmann should be held liable for the acts of Dr. U. V. Portmann, his son. The evidence is that the elder Portmann was called December 2, but that, because he was absent, his son responded to the call. Whether the father was responsible for the acts or omissions of the son is not important, for there is no evidence of malpractice on the part of the son. He took the child to Jackson, and, with his father, performed an operation. Plaintiff's counsel on the trial expressly disclaimed that there was “anything wrong in the operation itself.” Nor is any showing made of “anything wrong” in anything that the son did or omitted to do at any time.

6. There are many other assignments of error that do not require particular discussion. Some relate to the exclusion of evidence that

was not important. Some relate to evidence which was repetition of evidence in the records. Some relate to the exclusion of evidence the nature of which does not appear because of the absence of offer of proof. We have examined all and do not find substantial error.

Order affirmed.

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**MARTIN H. BREDE AND OTHERS v. MINNESOTA CRUSHED  
STONE COMPANY.<sup>1</sup>**

August 1, 1919.

No. 21,248.

**Nuisance — action to restrain operation of stone quarry — relief.**

1. When the undisputed evidence shows substantial interference with the comfort of residents in the vicinity of a stone quarry, caused by blasting and dust, they are entitled to some relief in an action brought to restrain the defendant from operating the quarry in such a manner as to constitute a nuisance.

**Restraining operation of lawful business — comparison of injury inflicted on parties not the test of relief.**

2. If a lawful business is conducted in such a manner as to interfere materially with the physical comfort of persons of ordinary sensibilities and habits, who live nearby, an injunction should be granted, permanently restraining its operation in such manner. A comparison of the injury defendant will suffer if an injunction is granted with the injury plaintiffs will suffer if it is denied, does not furnish the test by which the action of the court should be controlled.

**Defense of laches not open.**

3. The defense of laches is not available where for about two years plaintiffs have refrained from taking any action to restrain defendant from continuing to operate its quarry in the manner complained of, and it has expended a large sum of money in making permanent improvements on the property where it conducts its business.

**Revocation of license.**

4. A request that defendant quarry upon a certain portion of its premises is at most a license from those signing it, and is subject to revocation.

<sup>1</sup>Reported in 173 N. W. 805.

**Injunction — distinction between case of quarry and case of removable business.**

5. A distinction may properly be drawn between cases involving a nuisance caused by a factory or business which may be removed to another location, and those involving one caused by the operation of mines, quarries and other enterprises for the development of the natural resources of land which must be conducted at a fixed place. An injunction should not be granted as readily in the latter as in the former class of cases.

**Weight of evidence.**

6. No great weight should be given to the fact that a person complaining of a nuisance came to it or that others may be guilty of maintaining a similar nuisance in the same neighborhood.

**Nuisance — liability of landowner.**

7. A landowner may be liable for maintaining a nuisance by reason of his mode of carrying on a lawful business, even though the annoyances complained of are ordinary incidents of such a business when properly conducted.

**Same — additional evidence requisite.**

8. Further testimony should be taken to determine whether defendant may not remove or mitigate the annoyances complained of without seriously interfering with the prosecution of its business and such relief afforded to plaintiffs as may be justified by the additional evidence produced.

Action in the district court for Hennepin county to restrain defendant from so drilling, blasting and crushing stone on its premises as to cause plaintiffs injuries, discomforts and interference with the reasonable enjoyment of their respective homes, and to cause an impairment of the value of their respective properties. The case was tried before Fish, J., who when plaintiffs rested denied defendant's motion to dismiss the action, made findings that no injunction ought to be granted and dismissed the action. From an order denying their motion for a new trial, plaintiffs appealed. Reversed with directions.

*A. B. Jackson*, for appellants.

*Cohen, Atwater & Shaw*, for respondent.

LEES, C.

Alleging that defendant was operating a quarry in such a manner as



to create a private nuisance as to them, plaintiffs brought this action to enjoin the alleged nuisance. There was a trial without a jury, findings in favor of defendant, a motion for a new trial which was denied, and the case comes here on appeal from the order denying the motion.

In substance these were the facts as found by the trial court:

In 1904 defendant acquired the right to quarry and crush limestone underlying 40 acres of land in Lowry's East Side Addition to Minneapolis. Johnson street was its west boundary. The tract had been platted into lots and blocks, but was then wholly unoccupied. Defendant began quarrying operations thereon in 1904, which were continued until the summer of 1916. Later it acquired nine acres adjoining the 40 on the north. This is referred to as the "Kletzin" tract.

In quarrying, the defendant proceeds as follows: The earth and a stratum of shale are removed or stripped from the layers of limestone in which holes are drilled with steam drills and the stone is then blasted with dynamite. Fragments too large to handle conveniently are broken up by light charges of dynamite, and the stone is then loaded by a steam shovel into small cars and conveyed to a crusher on Johnson street. There the stone is crushed and separated into various sizes and sold for commercial uses. Railway trackage connects the property with the railways in Minneapolis.

When these operations were commenced there were few dwellings in the neighborhood and no street-car lines in the region. Now the region north and west of the quarry is fairly well settled, 32 of the plaintiffs residing within distances varying from 200 to 1,800 feet. They acquired their property for homes. A street-car line on Johnson street runs out beyond the quarry. In the region south and east of the quarry there are hardly any dwellings. It is devoted in the main to industrial uses and traversed by railroad tracks. West of defendant's quarry and within 300 feet of Johnson street there is another quarry operated by another company substantially as defendant's is operated. Defendant's land is mainly valuable for the underlying limestone.

In the three years immediately following 1904, several actions were brought against defendant by property owners in the vicinity of the quarry, who claimed to be damaged by defendant's operations. These actions were settled in October, 1907, by the payment of damages. Embodied in each settlement was a release of future damages which might

accrue from quarrying operations in Lowry's East Side Addition. Three of the plaintiffs in the present action and the predecessors in title of two of them made such settlements and gave such releases.

In the spring of 1915, defendant began to quarry on the Kletzin tract. Objections were made by a number of the residents on Johnson street, and the operations there were discontinued and resumed in Lowry's East Side Addition.

In the spring of 1916, a written request addressed to defendant was circulated among the residents in the neighborhood of the quarry, and was signed by or in behalf of 14 of the present plaintiffs. Defendant was thereby requested "to quarry the stone from the foregoing property (the Kletzin tract), using the utmost care in blasting, and refill same as soon as possible." On receiving this request in 1916, defendant again began and has since continued to quarry stone on the Kletzin tract, thus bringing its operations farther north and nearer to the dwellings of many of the plaintiffs.

In 1914, defendant began to grind the screenings from its quarry for use as a filler for asphalt paving. In 1915 and 1916, it installed and has since operated a pulverizing plant known as a "dust mill" to grind part of the product of its quarry to such fineness that it may be sprinkled on fields having an acid soil to neutralize the acids.

By the spring of 1916, defendant had invested in its buildings and equipment about \$100,000. In November, 1917, its crusher was destroyed by fire. In January, 1918, it began to rebuild it and had half completed it at the time of the commencement of this action, and had expended for that purpose and for machinery over \$44,000. In order to rebuild, it was necessary that defendant should obtain a permit from the building inspector of Minneapolis. Plaintiffs and others, on learning that defendant intended to rebuild, petitioned the city council to deny a permit, but the council refused to interfere and the permit was issued by the inspector.

The decision of the trial court turned upon the twelfth finding of fact, which in substance is as follows: Defendant's operations caused some discomfort and annoyance to the plaintiffs residing nearest to the quarry from the noises and vibrations created by the drills and steam shovels, by blasting, and from some increase of dust emanating from the dust mill. The consequences of the noise and dust are greatly ex-

aggregated by the testimony, and are naturally an incident to defendant's development and use of its property. An injunction against the operation of the quarry would destroy defendant's business and make its investment in buildings and equipment largely worthless, but the situation and surroundings are such that the cessation of its business would not add materially to the health or comfort of plaintiffs or to the free use and enjoyment of their property. In a memorandum appended to the findings, the court remarked, that the injunction must be either wholly given or wholly denied, no middle course being open, and that "there is enough merit in plaintiffs' contentions to require on defendant's part the utmost care to avoid unnecessary harm to neighboring property."

1. We have examined the voluminous record with care to ascertain whether this finding is sustained by the evidence. There is but little real conflict in the evidence. A host of witnesses, most of them parties plaintiff or members of their families, testified to substantial interference with the comfort of residents in the vicinity of the quarry caused chiefly by blasting and by dust from the dust mill. After making due allowance for many evident exaggerations in the testimony, the fact remains and is recognized in the findings, that defendant's operations do cause appreciable annoyance and discomfort to plaintiffs. That there were noise and dust is not disputed. The testimony of defendant's witnesses, who resided near the quarry, was that they did not find the noise and dust objectionable; some of them, because they had become accustomed to it. The explosions of dynamite and consequent jarring of plaintiffs' dwellings, of necessity disturbed the comfort and repose of persons living near the quarry, especially when they were accompanied, as was sometimes the case, by a shower of falling stones, which reached the premises of some of the plaintiffs. Limestone dust is acrid and sticky and much more annoying than ordinary street dust. The interference with plaintiffs' enjoyment of life and property was not of the sort to which city dwellers must submit as an inevitable accompaniment of urban life. It was shown to be offensive to the senses, and injurious to the health of many of the plaintiffs. Some 40 witnesses testified to conditions created by defendant, which would unfailingly cause substantial discomfort to ordinary individuals, while about one-third as many testified that the same conditions did not personally inconvenience

them. We take notice of the fact that the sensibilities of individuals vary, some being more and others less annoyed by noises and dust than the average person, but see no escape from the conclusion that the manner in which defendant is conducting its operations would necessarily cause material discomfort to ordinary people of average feelings and habits. We cannot give our approval to the twelfth finding of fact in its entirety, hence plaintiffs are entitled to some relief if not precluded from it on grounds now to be considered.

2. Counsel for defendant cite cases holding in effect that if the injury complained of is caused by the operation of a lawful business, carried on in a district given over to kindred classes of business, and the injury is only such as naturally flows from the operation of a business of that character, an injunction will not be granted if it would entail a serious injury to the defendant or to the public as compared to the injury complained of by the plaintiff. This is commonly referred to as the "comparative injury doctrine." The cases in which this doctrine has been given effect are collected in a note to *Town of Bristol v. Palmer*, 31 L.R.A. (N.S.) 881-893, and in 20 R. C. L. 480.

Other authorities adopt the ancient doctrine, that the rights of habitation are superior to the rights of trade, and, whenever they conflict, the rights of trade must yield to the primary or natural right. They hold that if a lawful business is conducted in such a manner as to offend or interfere materially with ordinary physical comfort, measured, not by the standards of persons of delicate sensibility and fastidious habits, but by the standards of ordinary people, a permanent injunction should be granted. The cases so holding are also collected in the note to *Bristol v. Palmer*, supra, page 888, and it is said that this doctrine is supported by the greater weight of authority. We are of the opinion that the latter is the better doctrine, and that ordinarily it should be applied in determining whether an injunction should be granted or denied in cases such as this.

3. Defendant began to operate its quarry in 1904, and no one sought to restrain its operations until this action was begun. Only a few of the plaintiffs have ever made any claim for damages. It is contended that they have, therefore, been guilty of laches or have at least acquiesced in the maintenance of the alleged nuisance, and hence are now barred from relief. We are of the opinion that this is not a good de-

fense. *Matthews v. Stillwater G. & E. L. Co.* 63 Minn. 493, 65 N. W. 947. If defendant was engaged in quarrying on the 40-acre tract only and was not operating its dust mill, the situation would be materially different, but the operations on the Kletzin tract and in the dust mill were begun only about two years prior to the commencement of this action. Defendant is now blasting nearer to plaintiffs' premises than ever before and is creating dust of a new character and in increased quantities. The period over which these conditions have extended is comparatively short and no claim of laches can be made successfully.

4. The effect of the request that defendant quarry on the Kletzin tract, which was signed by several of the plaintiffs, is next to be considered. Possibly those who signed it may not be entitled to relief by injunction, but, of course, their action is not binding on the plaintiffs who did not sign. At most the request amounted to a license to defendant to carry on its operations as it is doing, and, like other licenses, is subject to revocation. *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218, 41 Am. St. 367.

5. It has been held that every landowner has the right to develop and use the natural resources of his land, and, in the absence of negligence, is not liable for consequences incidental to such development and use. This is the doctrine in Pennsylvania and Kansas, and it is greatly relied on by the defendant here. *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 6 Atl. 453, 57 Am. St. 445; *Robb v. Carnegie Bros. & Co.* 145 Pa. St. 324, 22 Atl. 649, 14 L.R.A. 329, 27 Am. St. 694; *Alexander v. Wilkes-Barre Anthracite Coal Co.* 254 Pa. St. 1, 98 Atl. 794. L.R.A. 1917B, 310; *Phillips v. Lawrence, etc., Co.* 72 Kan. 643; *Helms v. Eastern Kan. Oil Co.* 102 Kan. 164, 169 Pac. 208, L.R.A. 1918C, 227. On the one hand it is said that these cases disregard the fundamental principle of the common law, that one must so use his own as not to injure another; and, on the other, that a coal mine, oil well, or stone quarry, must be operated at a fixed place and cannot be moved like a factory, and hence is not within the application of the principle.

We are inclined to think there is a distinction, but, as was pointed out in *Czarnecki v. Bolen-Darnell Coal Co.* 91 Ark. 58, 120 S. W. 376, the distinction is sound only insofar as it relates to things which are reasonably essential to the proper operation of a mine or quarry. In a well considered case, *Pwllbach Colliery Co. v. Woodman*, Ann. Cas.

1915D, 833, it was said, that permission to carry on a business is quite a different thing from permission to carry it on in such a manner as to create a nuisance. It ought not to be held that, because a landowner has a deposit of limestone on his land, he may quarry and fit it for commercial uses in any way he chooses, provided he is not negligent in what he does. He may be liable for maintaining a nuisance by reason of the manner in which he carries on his business, even though evil odors, noise, dust and the like are ordinary incidents of such a business when properly conducted. *Lead v. Inch*, 116 Minn. 467, 134 N. W. 218, 39 L.R.A.(N.S.) 234, Ann. Cas. 1913B, 891; *Matthias v. Minneapolis, St. P. & S. Ste. M. Ry. Co.* 125 Minn. 224, 146 N. W. 353, 51 L.R.A.(N.S.) 1017; *Lynch v. Shiely*, 131 Minn. 346, 155 N. W. 390; *Stuhl v. Great Northern Ry. Co.* 136 Minn. 158, 161 N. W. 501, L.R.A. 1917D, 317.

We are not disposed to adopt any rule which will hamper the development of the natural resources of the state, but in their development reasonable regard must be had for the health and comfort of people living in the neighborhood.

In *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. ed. 205, Mr. Justice Harlan remarked that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and in *State v. New England F. & C. Co.* 126 Minn. 78, 147 N. W. 951, 52 L.R.A.(N.S.) 932, Ann. Cas. 1915D, 549, this court quoting the remark said "that no vested \* \* \* right exists to use \* \* \* property for purposes injurious to either public health or morals."

6. The fact that many of the plaintiffs acquired their property after defendant began to operate its quarry is of no particular importance. But little is now left of the doctrine under which a person coming to a nuisance had no right to complain of it. 20 R. C. L. 495; 2 Wood, Nuisances, § 802; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *Oehler v. Levy*, 234 Ill. 595, 85 N. E. 271, 17 L.R.A.(N.S.) 1025, 14 Ann. Cas. 891; *Bushnell v. Robeson & Co.* 62 Iowa, 540, 17 N. W. 888; *Van Fossen v. Clark*, 113 Iowa, 86, 84 N. W. 989, 52 L.R.A. 279. Neither is much weight to be given to the fact that another quarry near plaintiffs' dwellings is operated similarly and with like effect upon the neighborhood. 1 Wood, Nuisances, § 558; 20 R. C. L. 492.

7. Under the undisputed evidence plaintiffs are entitled to some relief. We are unable to agree with the learned trial judge that either relief must be wholly denied or defendant's business destroyed. We think there is middle ground upon which the court's decision should be planted, and that by altering its mode of operations defendant may continue to carry on its business successfully without creating a nuisance. If, by adopting improved methods and appliances, the injuries complained of can be avoided, or at least so diminished that plaintiffs will suffer discomforts no greater than those ordinarily incident to life in many sections of every city, defendant should be required to adopt them. *Joyce, Nuisances*, § 90. *Harvey v. Susquehanna Coal Co.* 201 Pa. St. 63, 50 Atl. 770, 88 Am. St. 800.

The case is one in which relief should be given under the rule that an injunction should never go beyond the requirements of the particular case, nor should it close an industrial plant, if it is possible to avoid doing so, while giving plaintiff the relief to which he is entitled. Little or no evidence was introduced to show whether the noise of blasting can or cannot be smothered, or whether its jarring effects may or may not be reduced by using smaller charges of dynamite without seriously interfering with defendant's quarrying operations. The court was not advised as to the possibility of controlling the escape of lime dust from defendant's crusher and dust mill. We should suppose that it is feasible to confine the dust very largely to defendant's own premises and so remove, or substantially mitigate, the annoyance to plaintiffs from that source. Further testimony should be taken on these features of the case only, in order that the trial court may be in a position to act intelligently in affording plaintiffs relief, without destroying defendant's business.

The order denying a new trial is reversed and the case remanded for further proceedings in accordance herewith.

**ANTON GERAY v. MAHNOMEN LAND COMPANY.<sup>1</sup>**

August 1, 1919.

No. 21,252.

**Vendor and purchaser — when title is marketable.**

1. A marketable title to land is one that is fair of record and free from reasonable doubt.

**Same — when title is not marketable.**

2. Where the title depends for its validity on matters of fact dehors the record, the determination whereof requires a judicial decree, it is not marketable, and the vendee in an executory contract of sale is not bound to accept it.

**Same — patents under Indian Allotment Act.**

3. The rule applies to trust patents issued by the Federal government to certain Indians of the White Earth Indian Reservation under the "General Indian Allotment Act" of February 8, 1887, and acts supplementary thereto, which on their face do not convey the fee title.

**Same — patent to mixed blood Indians.**

4. The fact that the Clapp Amendment to the acts referred to, approved June 21, 1906, declares that such patents shall operate as a transfer of the fee title as to mixed blood Indians, does not clear the title until the character of the particular Indian as a mixed blood is established as a matter of record.

**Same — unmarketable title.**

5. With that fact unsettled and undetermined a title derived through a trust patent so issued is not marketable within the rule stated.

Action in the district court for Mahnomen county to recover \$2,000 paid on the purchase price of certain land to which defendant could not convey a marketable title. The case was tried before Grindeland, J., who when plaintiff rested denied defendant's motion to dismiss the action, made findings and ordered judgment in favor of plaintiff for the amount demanded. From an order denying its motion for a new trial, defendant appealed. Affirmed.

<sup>1</sup>Reported in 173 N. W. 871.



*Johnston & Carman*, for appellant.

*Clayton C. Cooper*, for respondent.

QUINN, J.

On June 23, 1916, the parties to the action entered into an executory contract for the sale and purchase of certain lands situated in Mahnommen county, whereby defendant sold and upon the payment of the purchase price agreed to convey the same to plaintiff by a "deed of general warranty," subject to a mortgage of \$12,000. The contract was in the common form and contained the stipulations and agreements usually found in such instruments. The purchase price was fixed at the sum of \$24,900, of which \$2,000 was paid at the date of the transaction; the balance, less the mortgage debt, being payable on or before March 15, 1917. Plaintiff duly tendered the amount of the deferred payment and demanded a deed conveying to him the fee or marketable title to the lands. In this connection the complaint alleged that defendant "failed, neglected and was unable \* \* \* to convey \* \* \* a good and marketable title \* \* \* as contemplated by said contract" of sale, and the court found the allegation true. Defendant, however, tendered to plaintiff a properly executed warranty deed in due form, which plaintiff rejected and refused to accept for the alleged reason that the title to the lands was defective and not marketable. And for the failure of defendant to convey a good title plaintiff gave notice of cancelation of the contract, and in June, 1917, brought this action to recover back the down payment of \$2,000. He had judgment and defendant appealed from an order denying a new trial.

Under the terms of the contract obligating defendant to convey the lands by deed of "general warranty" plaintiff was entitled to a marketable or fee title. *Murphin v. Scovell*, 41 Minn. 262, 43 N. W. 1. This is not controverted by defendant, its contention being that the deed tendered plaintiff conveyed to him a perfect legal title, and constituted a full and complete performance of the contract on its part. The correctness of that contention presents the only question in the case.

The facts in reference to the title are not in dispute. The lands came from the Federal government to certain Indians of the White Earth Reservation and in the form of "trust patents," as authorized and provided for by the Act of Congress of February 8, 1887, known as the

General Indian Allotment Act, and the Supplemental Act of January 14, 1889, wherein provision was made for the allotment of and the transfer and conveyance of certain Indian lands to tribal members in severalty, but vesting in the allottees a conditional and restricted title only, the government retaining the fee for the benefit and protection of the Indians for a period of years. The acts of Congress and patents issued thereunder have been under consideration in other cases, to which reference is made for more definite and specific information. *Dunnell*, Minn. Dig. and 1916 Supp. § 4348; *Vachon v. Nichols-Chisholm Lumber Co.* 126 Minn. 303, 144 N. W. 223, 148 N. W. 288. The title of defendant is founded wholly upon deed from Indians to whom "trust patents" were issued by the Federal government, but which on their face did not vest in the Indians the fee title. But defendant contends that the Indians were all mixed bloods, and that the title held by them is valid and perfect by force of the provisions of the so-called Clapp Amendment to the acts of Congress referred to, approved June 21, 1906, wherein and whereby all restrictions upon the right of the patentees to sell or incumber the lands patented or allotted to them was as to mixed blood Indians wholly removed, and the title conveyed by patents theretofore or thereafter issued declared a fee simple.

In support of that contention defendant on the trial offered to show by competent evidence that the particular Indians were all mixed bloods, to whose patents the Clapp Amendment applied, and that by force of the amendment each was the fee owner of the land thus conveyed to him. The court excluded the evidence on the theory that on their face the patents conveyed a restricted and conditional title, and one that plaintiff was not bound to accept; nor to assume the burden of litigation necessary to establish the character of the Indians, thus to remove the defects in the title appearing upon the face of the record. Therefore that the title tendered by the defendant was not in compliance with the contract. The ruling is assigned as error.

Plaintiff was entitled to a marketable title, one that was fair of record and free from doubt. *Howe v. Coates*, 97 Minn. 385, 107 N. W. 397, 4 L.R.A.(N.S.) 1170, 114 Am. St. 723; *Hubacheck v. Maxbass Security Bank*, 117 Minn. 163, 134 N. W. 640, Ann. Cas. 1913D. 187. Defendant was bound to tender him such a title at the time appointed for the performance of the contract of sale, and if he failed to do so,

had no right thereafter to amend or perfect it without the acquiescence of plaintiff, particularly after plaintiff had elected to rescind the contract and sue for the down payment. And if the title on its face is defective, the trial court was clearly right in excluding the proffered evidence as to the character of the Indians.

Was the title defective? The question is answered in the affirmative. A title that is imperfect of record and can be completed only by judicial decree founded upon parol evidence of extrinsic facts which may or may not be disputed, is not a clear title, and a vendee who is entitled by his contract to a marketable record title is not bound to accept the same. *Becker v. F. O. Erickson Co.* 142 Ill. App. 133; *Harrass v. Edwards*, 94 Wis. 459, 69 N. W. 69; *Fleming v. Burnham*, 100 N. Y. 1, 2 N. E. 905; *Justice v. Bulton*, 89 Neb. 367, 131 N. W. 736, 39 L.R.A.(N.S.) 1, and note on page 14. Such was the title tendered to plaintiff.

If the Indians were in fact mixed bloods the title was complete and free from fault. *U. S. v. Waller*, 243 U. S. 452, 37 Sup. Ct. 430, 61 L. ed. 843. But that fact could be established only in an appropriate judicial proceeding and in harmony with the basis for the determination of the character of the Indians stated and applied in *U. S. v. First National Bank*, 234 U. S. 245, 34 Sup. Ct. 846, 58 L. ed. 1298. In that situation we have no difficulty in holding that defendant failed to tender a valid title to the land at the time appointed for the performance of the contract, and that plaintiff was absolved from further obligation thereunder. His right to recover back the down payment is therefore clear.

Order affirmed.

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H. L. McWETHY v. G. J. NORBY.<sup>1</sup>

August 1, 1919.

No. 21,377.

**Negotiable Instruments Act — fraud in inception of note.**

1. A note, given to be used, with the notes of others, only as collateral to a note of the payee, and which is sold and indorsed by the payee before maturity as an original obligation, is negotiated "in breach of

<sup>1</sup>Reported in 173 N. W. 803.

faith" and "under such circumstances as amount to a fraud" within the meaning of the Negotiable Instruments Act.

**Same — evidence.**

2. There was evidence in this case that the note sued on was so given. The evidence does not conclusively show that it was not.

**Bills and notes — burden on plaintiff indorsee — sufficiency of evidence.**

3. Proof having been made that the note was defective, the burden was upon the plaintiff, an indorsee, to show that he purchased it for value, in good faith, and without notice. The evidence on this point made a question of fact for the jury. It was not conclusive in plaintiff's favor. Evidence not directly contradicted may not command a verdict, where the inferences to be drawn from all the circumstances may lead to different conclusions by reasonable men.

**Same — certificate of stock — letter admissible.**

4. Plaintiff claimed that the note was given for the purchase price of stock sold defendant. It appeared that, at a time after the note had been negotiated, a certificate of stock had been transmitted by mail to defendant. It was proper to admit an accompanying letter in evidence in explanation of the sending of the stock.

**Same — admissibility of evidence.**

5. It was not error to permit examination of plaintiff as to whether he inquired of the maker before purchasing the note.

**Appeal and error — order in reception of evidence immaterial.**

6. The order in which evidence is received does not concern this court on appeal.

Action in the district court for Becker county to recover \$1,000 upon a promissory note. The answer alleged in defense the facts mentioned at the beginning of the opinion. The case was tried before Roeser, J., who at the close of the testimony denied plaintiff's motion for a directed verdict, and a jury which returned a verdict in favor of defendant. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, plaintiff appealed. Affirmed.

*Johnston & Carman*, for appellant.

*H. N. Jenson*, for respondent.

**HALLAM, J.**

Action by an indorsee of a promissory note for \$1,000. The jury

found for defendant. Plaintiff appeals. The facts shown in defense are as follows: The Service Machine Corporation, with headquarters at Aurora, Illinois, was engaged in the manufacture of a postage stamp vending machine. Enterprising agents sold considerable stock in the vicinity of Detroit, Minnesota. Defendant became a stockholder. Defendant testified that, thereafter, and in July, 1916, an agent of the corporation procured from him this note on the representation and with the stipulation that it was to be used with the notes of others of his neighbors, only as collateral to the note of the corporation, and to enable the corporation to float a loan; that stock in double the amount of the notes was to be deposited with C. A. Baker, as trustee, as security; that the corporation proposed to put men in the field to sell the stock at par; that one-half of the proceeds was to be used to repay the money borrowed, 25 per cent of the other half was to go to expense of selling the stock, and defendant was to receive back his collateral note, fully discharged, together with \$750 worth of stock for the use of his credit. Defendant's better judgment was against going into the scheme, but "knowing all the other fellows were going in" he gave his consent. His anticipations were not realized. The corporation, instead of using the note as collateral, sold it to plaintiff without giving its own note at all. It sold no stock and when the due date of the note came, instead of its being returned, canceled, with a large bonus of stock for the accommodation, defendant found a demand for payment made upon him by plaintiff, who claimed to be a good faith purchaser for value. These are the facts claimed by defendant and the facts which we may assume the jury found true.

Two questions are presented: First, was the note defective in its inception? and if so, second, was plaintiff a bona fide purchaser for value?

1. The Negotiable Instruments Act provides that "the title of a person who negotiates an instrument is defective within the meaning of this act \* \* \* when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." G. S. 1913, § 5867.

It seems clear that this case is within the statute. The Service Machine Corporation could not have maintained an action on this note. Like an accommodation note it had no vitality, no real inception, until negotiated. It was in substance agreed that it should have no inception

as a note until negotiated as collateral to the corporation note. That was a condition to its becoming a binding undertaking. There is a vast difference between negotiating a note as collateral, as one of a number of collateral notes, and negotiating it as an original obligation. This case illustrates it. The corporation liability as an indorser was not preserved. If defendant is liable at all he has no recourse on the note, against the corporation. Had his note been used as collateral only, he would have had recourse against the corporation and contribution as against the makers of the other collateral notes. Clearly the note was negotiated "in breach of faith" and "under such circumstances as amount to a fraud." *In re Hopper-Morgan Co.* 156 Fed. 533, affirmed *In re Hopper-Morgan Co.* 91 C. C. A. 37, 166 Fed. 1020. See *Mendenhall v. Ulrich*, 94 Minn. 100, 101 N. W. 1057; *Stoddard v. Kimball*, 6 Cush. 469; *Bowman v. Van Kuren*, 29 Wis. 209, 9 Am. Rep. 554; *Beach v. Nevins*, 162 Fed. 129, 89 C. C. A. 129, 18 L.R.A. (N.S.) 228.

2. Plaintiff claims that the evidence shows conclusively that the note was given, not as collateral, but in payment of stock purchased by defendant. We have examined the evidence carefully and cannot come to this conclusion. It is urged that certain written documents are conclusive to that effect. We do not concur in this. The documents consist of, first, a letter from the service corporation to C. A. Baker, trustee, in which the corporation agreed to sell 2,500 shares of "your common capital stock, par value ten dollars," within a year and "to net you twenty thousand dollars cash for said stock," and second, a receipt, signed by the corporation, acknowledging receipt from defendant of \$1,000 in full payment for 200 shares of the common capital stock of the corporation, "said shares to be issued to and held by C. A. Baker, trustee." But defendant's testimony is that he never saw these documents and did not receive the receipt until long after the note was given and transferred to plaintiff. The documents are not conclusive evidence against defendant.

3. The next question is, was plaintiff a bona fide purchaser, for value, without notice of the defect in the note. In other words, is there evidence to sustain a finding that plaintiff's action in taking the instrument amounted to bad faith? G. S. 1913, § 5868. We think the evidence made this question one of fact for the jury.

Proof having been made that the note was defective, the burden was upon the plaintiff to show that he purchased the note for value, in good faith, and without notice of the fraud. *Mendenhall v. Ulrich*, 94 Minn. 100, 101 N. W. 1057; *Cole v. Johnson*, 127 Minn. 291, 149 N. W. 466; *Snelling State Bank of St. Paul v. Clasen*, 132 Minn. 404, 157 N. W. 643. Plaintiff and Mr. Moriarity, president of the service corporation, were intimate. They had held stock together in a former corporation which was reorganized into the service corporation. Plaintiff was a stockholder in the service corporation, and held bonus stock. He knew that the note arose out of a stock selling transaction. The maker of the note was a stranger, hundreds of miles away. Plaintiff testified that he inquired of a Detroit bank as to the maker and that he had a copy of the letter but did not produce it, nor did he produce the answer of the bank or state what it was. Yet he took this note without security, other than the service corporation's indorsement, and then released the indorsement by failure to protest the note. He sent the note for collection through a bank. No explanation is given as to why the bank did not protest the note to hold the indorser, as it was under obligation to do unless instructed to the contrary. *Jagger v. National G. A. Bank*, 53 Minn. 386, 55 N. W. 545. When fraud in the procurement of the note was asserted, he brought suit on it, without ever suggesting to the indorser that it had sold him a note claimed to have its inception in fraud, and without even advising it of the bringing of the suit. His conduct with reference to the note after it became due is material. See *Dekalb Nat. Bank v. Thompson*, 79 Minn. 151, 81 N. W. 765.

True plaintiff testified that he paid value for the note; that it was part of his business to purchase notes; that the service corporation assured him the note was good, and that he had purchased other notes from the corporation which had been paid. His testimony as to his good faith is not conclusive. Evidence not directly contradicted may not command a verdict, where the inferences to be drawn from all the circumstances may lead to different conclusions by reasonable men. *Elwood v. Western Union Tel. Co.* 45 N. Y. 549, 6 Am. Rep. 140.

4. Over objection of plaintiff, the court received in evidence a letter written by "W. F. Moriarty, President," to defendant on August 13, 1917, in which the writer inclosed 75 shares of stock of the service corporation and stated: "This is the stock earned by you on the deal made

with you a year ago. In addition to this we have issued certificate No. 667 for one hundred twenty-five shares of the common capital stock of this company, which stock will be attached to the new notes which you are giving to take the place of the ones now past due. \* \* \* We have not had an opportunity to settle on the discount on these notes, but pending this you can take up the old notes with the new ones as we will make the necessary arrangements for this exchange \* \* \*." Plaintiff contends that this was simply an admission by the former owner of the note in disparagement of the title of plaintiff, the indorsee, and that it was, therefore, not admissible. The evidence could not be received for that purpose. *Roach v. Halvorson*, 127 Minn. 113, 148 N. W. 1080. We think, however, it was admissible for another purpose. Plaintiff's counsel, on cross examination, dwelt upon the fact that this 75 shares of stock was delivered to defendant, and he was manifestly impressing the claim that this fact pointed to the conclusion that the whole transaction was a stock sale as plaintiff claimed it to be. In explanation we think it was proper to show the circumstances under which the stock was delivered by the letter which accompanied the delivery.

5. Some rulings on admissibility of evidence are assigned as error. They present no reversible error. It was not error to permit defendant to inquire whether, before purchasing the note, plaintiff has inquired of the maker regarding the same. He was not called upon to make such inquiry in the absence of some facts which should lead him to believe that the paper was defective. *Cochran v. Stewart*, 21 Minn. 435. But it was proper to show what plaintiff did do as part of the history of the case. Testimony that members of plaintiff's family were connected with the service corporation was not of much importance or prejudice. The testimony as to the circumstances of the making of the note was proper. Whether it was received out of regular order is not important.

We find no substantial error in the charge.

Order affirmed.



**FORD MOTOR COMPANY v. CITY OF MINNEAPOLIS.<sup>1</sup>****August 1, 1919.****No. 21,316.****Eminent domain — award of damages to landowner — interest allowed.**

1. Unless otherwise provided, land taken under the power of eminent domain is deemed to have been taken at the date of the filing of the award of damages, and, if the damages are reassessed on appeal, such reassessment is to be made with respect to the value and condition of the property at the time of the original award and as of that date, and the landowner is entitled to interest from the date of the original award on the amount of the award as finally fixed and determined, less the value of whatever beneficial use he may have made of the land after the filing of the original award.

**Same — presumption as to date of award upon appeal and as to interest.**

2. It is presumed that an award made on appeal was made as of the date of the original award and that it did not include interest.

**Same — court may allow interest and deduct value of use.**

3. The city of Minneapolis established an alley under the power of eminent domain. On appeal to the district court from the award of damages, they were reassessed. Thereafter the landowner applied for the allowance of interest from the date of the original award and the city claimed an offset thereto for the use made of the land by the landowner after that date. *Held*: That the court had authority to allow the interest and also to determine the amount, if any, to which the city was entitled as an offset thereto, and that the court should have allowed the interest less a proper deduction for whatever use the landowner was shown to have made of the land.

After the second appeal reported in 136 Minn. 475, 162 N. W. 1087, the motion of the Ford Motor Company in the district court for Hennepin county for the allowance of interest on the award from the date of the first award until the making of the motion, and for judgment for the amount of the award, with interest so computed, was denied by Steele, J. From the order denying the motion, Ford Motor Company appealed. Reversed.

<sup>1</sup>Reported in 173 N. W. 713.

*Milton D. Purdy*, for appellant.

*C. D. Gould* and *R. S. Wiggin*, for respondent.

TAYLOR, C.

The city of Minneapolis instituted proceedings to condemn the right of way for an alley through a block of land owned and occupied by the Ford Motor Company. The commissioners, appointed by the city to assess benefits and damages, filed their award on July 30, 1915. The motor company appealed to the district court from the award of damages and also from the order establishing the alley. The district court affirmed the order establishing the alley and appointed commissioners to reassess the damages. The motor company attacked the validity of the proceedings by writ of certiorari and the matter was before this court twice, the decisions being reported in 133 Minn. 221, 158 N. W. 240, and 136 Minn. 475, 162 N. W. 1087. After the validity of the alley had been established, the commissioners appointed by the court proceeded to make their assessment and on April 8, 1918, filed their report awarding the motor company the sum of \$34,300.

On May 22, 1918, on motion of the motor company, the court confirmed this award and taxed and allowed the costs. Section 1569, G. S. 1913, gives the city 90 days after the final order of the court within which to abandon the proceedings if it so elects. After this period had expired, the motor company applied to the court to have interest computed and allowed on the award from July 30, 1915, the date of the original award, and for judgment for the amount of the award with interest. The city opposed this application and also asserted that the motor company had used the premises continuously and that the value of this use should be determined and be applied as an offset against the interest, if interest were to be allowed. The application was denied by the court on January 7, 1919, and the motor company appealed from the order denying it.

The questions presented are whether the court should have computed and allowed the interest as claimed, and, if so, whether it should have determined the value of the use made of the land by the motor company since the original award, and should have deducted the value of such use from the amount allowed as interest. The district court seems to have been in doubt as to its authority to determine these questions.

The commissioners, appointed by the city, assess the damages of the landowner as of the date they make and file their award and with respect to the value and condition of the property at that time, and the property is deemed to be taken as of that date. 1 Dunnell, Minn. Dig. § 3060, and cases cited. If the damages are reassessed on appeal, such reassessment is made as of the date of the original award, and the damages are based on the value and condition of the property at the time of the original award, and the landowner is entitled to interest from the date of the original award upon the amount of the damages as finally assessed and determined. *Warren v. First Division St. P. & Pac. R. Co.* 21 Minn. 424; *Whitacre v. St. Paul & S. C. R. Co.* 24 Minn. 311; *Leber v. Minneapolis & N. W. Ry. Co.* 29 Minn. 256, 13 N. W. 31; *City of Minneapolis v. Wilkin*, 30 Minn. 145, 15 N. W. 668; *Commrs. of State Park v. Henry*, 38 Minn. 266, 36 N. W. 874; *Weide v. City of St. Paul*, 62 Minn. 67, 64 N. W. 65. If the owner makes a beneficial use of the premises subsequent to the filing of the original award, the value of such use may be deducted from the interest allowed. *Warren v. First Division St. P. & Pac. R. Co.* 21 Minn. 424. Unless the record shows upon its face that other items were litigated and included in the award, the presumption is "that it included only what it should properly include, namely, compensation for the appropriation of the claimant's land, with sole reference to its value and condition at the time when the award was filed, and it would not be admissible to show by evidence dehors the award that the damages (for prior trespass) mentioned were included in it." *Leber v. Minneapolis & N. W. Ry. Co.* 29 Minn. 256, 13 N. W. 31. See also *City of Minneapolis v. Wilkin*, 30 Minn. 145, 15 N. W. 668.

The reasons for adopting the above rules are stated and explained in the cases cited. Although the city concedes that the rule in this state is as stated, it contends that interest should be allowed only from the time that the city takes possession of the property appropriated, and cites several authorities sustaining that rule. The same point was urged in the *Wilkin* case decided in 1883 and the court speaking through Justice Mitchell said:

"If the question was one of first impression, a plausible argument might be made in favor of the position that no interest should be allowed until the corporation had taken the actual possession of the prop-

erty from the owner. But this is no longer an open question in this state. Whatever objection may be urged against the logic of the rule adopted by this court, we are satisfied that it works out practical justice more nearly than any other that can be suggested; and it has been so often affirmed and applied that it must be considered the settled law of this state."

The rules stated have been recognized and applied in this state from the beginning and we see no sufficient reason for now changing them. Applying them to the present case, it follows that the motor company is entitled to interest on the \$34,300 from July 30, 1915, as a part of the compensation to which it is entitled for the taking of its property.

The authority of the court to make the computation and allowance, seems not to have been questioned in the Wilkin case. But this question was considered in *Warren v. First Division St. P. & Pac. R. Co.* 21 Minn. 424, and the court, after saying in effect that the statutes "must be construed so as to conform to the constitutional requirements," and that the condemner acquires no title or easement in the property unless the constitutional requirement of just compensation is complied with, and that the title or easement of the condemner comes through the award, said:

"It is the intention, we must presume, that the award, when it becomes final \* \* \* shall, upon payment, or tender, or deposit, be effectual to pass the title; and that, consequently, the court shall have such authority in respect to the judgment as may be required to make it effectual for the purpose intended, and especially as the exercise of such authority is not expressly prohibited by the act. If, therefore, the allowance of interest upon the amount of the assessment shall be necessary to make the compensation just, we have no doubt of authority in the court to make it."

While the *Warren* case was under a different statute and involved the condemnation of a railroad right of way, the principles laid down apply to the present case. By virtue of the Constitution, the city, in order to take the property in question, must make proper provision for the payment of the award with interest. The just compensation required by the Constitution includes not only the amount of the final award, but also the interest thereon from the date of the original award until the money becomes available to the landowner. See cases cited

supra. Such interest could not well be included in the final award as the full amount of interest could not be determined at that time. There is nothing tending to show that interest was included in the award in controversy and the presumption is that it was not. The statute contains no specific provision that the court shall determine either the amount of the interest, or the amount deductible therefrom for the use of the premises, if used by the landowner after the filing of the original award; but, in order to make the proceedings effectual and accomplish the purpose intended, the court must determine the various incidental questions that arise, and, as said in effect in the Warren case, the statute undoubtedly contemplates that the court will do so.

In the Wilkin case the city appointed commissioners who made an award of damages. On appeal to the district court the award was increased. Thereafter the landowner made an application to have interest computed in her favor on the final award from the date of the original award. The district court denied the application, but this court, after careful consideration, held that the ruling was error and remanded the case with instructions to allow interest on the final award from the date of the original award. In the case at bar the motor company followed in detail the procedure adopted in the Wilkin case, and we see no reason why such procedure is not proper.

We are of opinion that the rules laid down by this court in its prior decisions should be followed and applied in the instant case, and that the trial court should have allowed interest on the final award from the date of the original award. We are also of opinion that the trial court should have determined the value of the use made of the land in question by the motor company since the date of the original award and should have offset the value of such use against the interest. In the absence of statutory regulations, the court may determine these questions itself or may adopt any proper procedure for determining them.

The order appealed from is reversed and the cause remanded for further proceedings in accordance with this opinion.

W. ZINKEN v. MELROSE GRANITE COMPANY AND ANOTHER.<sup>1</sup>

August 8, 1919.

No. 21,193.

**Workmen's Compensation Act — finding of injury supported by evidence.**

1. A finding that lime was splashed into the eyes of a stone mason by a fellow workman and that both eyes were injured is sustained by the evidence.

**Same — release for loss of one eye not a bar to claim for the other eye.**

2. A settlement made by the workman with his employer and the insurer of the employer on the mutual assumption that he was entitled to compensation for the loss of one eye only, and a release executed on the same assumption, do not bar him from thereafter claiming compensation for the injury to the other eye.

**Same — permanent partial disability.**

3. A workman's left eye had been injured so that one-half of his ability to see with it was lost. Thereafter, in the course of his employment, both eyes were injured, the right so badly that it became necessary to remove it, and the left to such an extent that, although he is not totally blind, he can no longer follow any occupation. *Held*, that he is entitled to the compensation for permanent partial disability which is fixed by the schedule found in section 4, c. 209, Laws 1915, that the amount of compensation is not determined by the clause in the schedule covering the loss of one eye, but by the clause which provides that the compensation shall be 50 per centum of the difference between the wage of the workman at the time of his injury and the wage he is able to earn in his partially disabled condition, for a period not exceeding three hundred weeks.

Proceeding in the district court for Stearns county under the Workmen's Compensation Act in which judgment was entered in favor of the workman and against his employer and the insurer of the employer. Upon the relation of the employer and its insurer the supreme court granted its writ of certiorari directed to the district court for Stearns county and the Honorable John A. Roeser, judge thereof, to review the proceedings in that court. *Affirmed*.

<sup>1</sup>Reported in 178 N. W. 357.

*L. N. Foster and John D. Sullivan, for relators.  
Paul Ahles, for respondent.*

LEES, C.

This was a proceeding under the Workmen's Compensation Act, in which Zinken, an employee of the Melrose Granite Company, was awarded compensation, and his employer and its insurer, The Travelers Insurance Company, by writ of certiorari, bring here for review the judgment entered for the amount awarded.

Zinken was a stone mason employed on July 20, 1915, by the granite company in laying the foundation walls of a building it was erecting. Mortar was brought to him by a fellow workman, whose duty it was to deposit it on a mortar board. In doing so, he carelessly splashed some of the mortar into Zinken's face and eyes and the lime burned his right eye so badly that it became necessary to remove it, and also injured his left eye as hereafter stated. Several years before, Zinken's left eye had been struck with a hammer and quite seriously injured. It healed, but the pupil was elongated, there was some adhesion of the iris to the cornea, some scar tissue formed over the cornea, and the eye lacked the power of accommodation. In consequence of this injury, it had lost one-half of its normal power of vision. Zinken's wages were \$24.30 per week. The accident totally disabled him from thereafter earning any wages. Eleven hundred dollars was paid him in instalments of \$22 each, pursuant to an agreement for a settlement executed in August, 1915. On June 16, 1917, when the final instalment was paid, he executed a release of all further claims he might have against his employer and the insurance company.

In July, 1918, he commenced this proceeding. The trial court found that his left eye, as well as the right, was burned by the lime, and that the scar tissue over the cornea was thereby enlarged to such an extent that he had lost all practical vision, being only able to have light perception through a small section of the cornea. It was found that he was entitled to receive \$3,300 total compensation, less \$1,100, which had been paid, and that the release given in consideration of the payment of the latter amount was not binding upon him, for the reason that he signed it because he was told and believed that it was a receipt like the other receipts he had signed as the several instalments were paid.

As presented in argument, the questions are: (1) Was the court justified in finding that lime was splashed in Zinken's left eye? (2) Was it justified in disregarding the settlement and release? (3) If both questions are answered in the affirmative, was the correct amount awarded as compensation?

1. No useful purpose would be served by a review of the evidence bearing on the question of whether lime was or was not splashed in Zinken's left eye. His own testimony, if credited, would support a finding that it was. The testimony of Dr. Whiting to the contrary is quite persuasive. There might have been a finding either way, hence we are not required to hold that the finding in his favor is manifestly against the clear preponderance of the evidence, and it cannot be disturbed. *State v. District Court of St. Louis County*, 137 Minn. 435, 163 N. W. 755, L.R.A. 1917F, 1094.

2. Zinken testified that Dr. Whiting, who was employed by the insurance company to attend him, told him, after removing his right eye, that he would be paid \$11 per week for 100 weeks, that this was the amount allowed by law for the loss of one eye, and that in a short time he would be able to use his left eye as well as ever. Compensation was agreed upon on that basis and payments were made at intervals of two weeks. He was required to sign a receipt for each instalment when it was paid. When he received the last instalment his employer's bookkeeper told him to sign a paper, saying it was the same as those he had signed before. This paper was the release already referred to. Dr. Whiting testified that he told Zinken not to go to the expense of employing a lawyer because the law provided a maximum of \$1,100 for the loss of an eye, and that the insurance company would pay him this amount voluntarily. There was no other testimony relating to the signing of the agreement for settlement or the release. It is apparent that both parties acted throughout on the assumption that Zinken was legally entitled to receive compensation only for the loss of his right eye. There was no pretence of compensation for the injury to the left eye. Under these circumstances we think the court was clearly right in holding that neither the agreement for a settlement nor the release barred Zinken from asserting his present claim.

3. The amount of compensation to which Zinken was entitled must



be ascertained by referring to the following provisions of the Compensation Act.

Section 8209, G. S. 1913, reading as follows:

"If an employee receive an injury, which, of itself, would only cause permanent partial disability, but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury."

And parts of section 4, c. 209, Laws 1915, reading as follows:

"(c) For permanent partial disability, the compensation shall be based upon the extent of such disability. In cases included by the following schedule, the compensation shall be that named in the schedule, to-wit:

"For the loss of an eye, fifty per centum of daily wages during one hundred (100) weeks."

"In all other cases of permanent partial disability not above enumerated, the compensation shall be fifty per centum of the difference between the wage of the workman at the time of the injury and the wage he is able to earn in his partially disabled condition, subject to a maximum of eleven (\$11.00) dollars per week. Compensation shall continue during disability, not, however, beyond three hundred (300) weeks."

Clause (e) of the schedule provides that the total and permanent loss of the sight of both eyes shall constitute permanent total disability for which compensation shall be paid for a period of 400 weeks.

It was contended in Zinken's behalf, and the court found, that his is a case of permanent partial disability, entitling him to compensation at the rate of \$11 per week for 300 weeks. The opposing contention is that at most he was entitled to \$11 per week for 100 weeks for the loss of his right eye and to \$5.50 per week for the same period for the injury to his left eye. Section 8209, G. S. 1913, as construed in *State ex rel. Garwin v. District Court of Cass County*, 129 Minn. 156, 151 N. W. 910, is relied upon as support for this contention.

In the *Garwin* case the workman was blind in one eye and lost the other while engaged in performing the duties of his employment. It was held that he was entitled to receive 50 per cent of his wages for

100 weeks, the amount specifically fixed by the schedule for the loss of one eye. He was compensated on the same basis as though he had been possessed of two normal eyes at the time of the injury and had lost one of them.

The explicit provision of the statute led inevitably to the conclusion reached in that case. But this provision does not fit the case of a workman whose injury destroyed one eye and half of the sight of the other. Under the ruling in the Garwin case, a workman who comes within the scope of section 8209 cannot claim the compensation which is secured to one who has been permanently and totally disabled, but is only entitled to compensation for permanent partial disability. We are now asked to construe the statute to mean that a workman's eyes are to be valued separately—a good eye, in the case of a man earning the wage of Zinken, at \$1,100, and an eye which is only 50 per cent efficient, at \$550. It would be both narrow and illiberal so to construe it, whereas we have consistently held that it is to be liberally construed in favor of workmen. *Dunnell*, Minn. Dig. 1916 Supp. § 5854b; *State v. Nye*, 136 Minn. 50, 161 N. W. 224. Zinken had one perfect and one imperfect eye. Mortar was thrown in both of them and both were burned. At the time when his eyes were thus injured, his eyesight, by reason of the previous injury to his left eye, was a fourth less than normal. His employer is required to compensate him only for the disability caused by the loss of three fourths of his eyesight, without reference to the fact that he is now practically deprived of all power of sight, as a consequence of his previous injury combined with the injury for which his employer is responsible.

Clause (e) of the schedule does not apply, for he has not suffered a total loss of the sight of both eyes, as a result of the injury sustained while in the service of his employer.

In fact he is not blind, for according to the findings he is still "able to have light perception, and get some slight glimpses through a small section of the upper part of the cornea," but he can no longer see sufficiently to do any kind of work.

His employer is liable for compensation for the permanent partial disability suffered by Zinken, and the court so finds. It is also found that the extent of such disability is equivalent to "75 per cent of the loss of both eyes."

The precise question is this: On what basis is an injured workman's compensation to be determined, when his employer is required to compensate him for the loss of 75 per cent of the normal power of vision?

Such loss must of necessity be occasioned by an injury to both eyes which may not wholly destroy either of them, or may destroy one and reduce the sight of the other one half as was the case here.

On the theory of the petitioner, the basis would be compensation for 100 weeks for the lost eye and for 50 weeks for the other. But on the same theory, if one eye were destroyed and the other deprived of ninety-nine one-hundredths of its power of vision, compensation would be made for but 199 weeks, although the workman would be practically blind, and, as we have already pointed out, for the total loss of sight, the statute provides for compensation for 400 weeks. In many cases the adoption of the theory advanced would lead to results which were manifestly not intended by the legislature.

Attention is called to the clause in the schedule relating to permanent partial disability due to injury to a member, resulting in less than total loss of such member, which is said to lend support to the theory of the petitioners.

In common usage the term "member," as applied to the human body, means the extremities of the body and particularly the arms and legs. See Century Dictionary, under Member.

But if the term as used in the statute is to be taken to mean an eye as well as a hand or foot, the result of the adoption of petitioners' theory would be the same in the cases above referred to for the purpose of illustration.

We conclude, therefore, that compensation in such a case as we have here is not to be made on the basis suggested, but rather under that clause of the schedule which governs in all cases of permanent partial disability not specifically enumerated in the schedule. Zinken is entitled to 50 per cent of the difference between his wages when injured and the wages he is able to earn in his partially disabled condition, subject to a maximum of \$11 per week for not more than 300 weeks.

He has been wholly unable to earn any wages since he was injured, hence he is entitled to \$3,300 less \$1,100 already paid.

The trial court correctly awarded him \$2,200, and its judgment is hereby affirmed.

STATE v. C. D. WHIPPLE.<sup>1</sup>

August 22, 1919.

No. 21,135.

**Sale of narcotics forbidden — prescription by physician.**

1. Section 1, chapter 260, Laws 1915, forbids the sale of narcotic drugs, but provides that pharmacists may dispense the same upon the written prescription of a physician, and that a physician may administer such drug to a patient upon whom he is in professional attendance. There are exacting requirements as to records to be kept in both cases. Section 2 forbids any physician to furnish or prescribe any such drugs for the use of an habitual user, provided this shall not prevent a physician from prescribing in good faith for the use of any patient for treatment of the drug habit such substances as he may deem necessary.

**Same — when patient is habitual user — charge to jury.**

2. It was proper to instruct the jury that the statute makes a distinction between the dispensation of these drugs to habitual users and to ordinary patients; that, in the case of patients not addicted, the physician may prescribe them and also furnish them, but that in case of habitual users he may not furnish the drug, but may only give a prescription to be filled by a pharmacist under the safeguards imposed by the law.

**Criminal law — evidence of other offenses.**

3. It was proper in this case to receive evidence of other sales of narcotics to the same addict and of other sales to other addicts. Such evidence was within the rule which permits evidence of this character when it is part of one scheme to violate the law or when it tends to show an inclination or predisposition to violate the law.

**Same — construction of statute — charge to jury.**

4. It was not reversible error to instruct the jury that when a law is a new one and subject to misinterpretation that is not a defense.

**Poison — evidence.**

5. The court refused to receive in evidence a stamp with which defendant said he stamped all containers of such drugs dispensed by him. A package found on the person to whom, it is charged, defendant sold morphine, bore no stamp, but it is admitted that defendant fur-

<sup>1</sup>Reported in 173 N. W. 801.

nished him the quantity of the drug found in his possession. *Held* no error.

**Poison — "prescribe" and "furnish" in statute.**

6. The words "prescribe" and "furnish," as used in Laws 1915, c. 260, § 2 (G. S. Supp. 1917, § 8965-2), which forbids any physician to prescribe or furnish narcotic drugs for use of an habitual user, are used in their ordinary sense; "prescribe" meaning to give medical direction, to indicate remedies, and "furnish" meaning to supply or provide.

Defendant was indicted by the grand jury of Hennepin county charged with the crime of furnishing and selling narcotic drugs to habitual users, tried in the district court for that county before Fish, J., and a jury which returned a verdict of guilty as charged in the indictment. From the judgment entered pursuant to the verdict, defendant appealed. *Affirmed.*

*Ernest S. Cary and John F. Dahl*, for appellant.

*Clifford L. Hilton*, Attorney General, *James E. Markham*, Assistant Attorney General, and *William M. Nash*, County Attorney, for respondent.

**HALLAM, J.**

Defendant was convicted of the violation of chapter 260, p. 358, Laws 1915, prohibiting the sale of narcotic drugs. The particular charge was that on January 21, 1918, he sold six grains of morphine to Frank Chandler. Defendant is a licensed physician. Chandler was an habitual user of the drug. Defendant admitted that on January 21, 1918, he gave to Chandler six grains of morphine and received four dollars from him. The evidence on the part of the state was that defendant sold the morphine to Chandler without any pretense of professional treatment. Defendant's claim was that he had been treating Chandler since September, 1917, for the drug habit by the gradual reduction method, which consists in administering the drug in gradually diminishing quantities to a point where the habit may be more easily cured, and that the transaction on January 21 was part of this treatment.

1. Section 1 of chapter 260, in general terms, forbids the selling of morphine and certain narcotic drugs, but provides that licensed phar-

macists may fill orders for the drug to a consumer pursuant to the written prescription of a physician. The sales in such cases are well hedged in by restrictive conditions. The most important are, that the prescription must be dated on the day on which it was signed and must bear the signature and address of the physician and the name of the person for whose use it is intended. It must be serially numbered and dated, and must be filed in its appropriate place in the prescription file of the compounder and retained on file for two years, open to inspection by any duly authorized officer of the law. Prescriptions may be filled but once, no copy may be given except to an officer of the law, and the medicine dispensed must be delivered in a container labeled with the serial number of the prescription, the date filled, the name of the person for whose use the medicine is intended, the name of the prescriber, and the name and address of the dispenser.

Section 1 further permits the "administration, sale, or disposal" of such drugs "by a legally licensed physician \* \* \* to a patient upon whom he is in professional attendance," provided the physician shall keep a record of the name and address of the patient, the date of sale or disposal, and the amount of the drug transferred, and the drug must be delivered in a container, labeled with the name of the patient, the date of delivery, and the name and address of the dispenser.

Section 2 provides: "It shall be unlawful for any physician or dentist to furnish to or prescribe for the use of any habitual user of the same any of the substances enumerated in section 1 of this act; provided that the provisions of this section shall not be construed to prevent any legally licensed physician from prescribing in good faith for the use of any patient under his care, for the treatment of a drug habit such substances as he may deem necessary for such treatment; provided that such prescriptions are given in good faith for the treatment of such habit."

3. The court instructed the jury that, under this statute, "physicians are not permitted by law \* \* \* to sell or furnish to habitual users, out of stocks kept on hand for any purpose, these habit forming drugs;" that "all sales and deliveries of such substances \* \* \* to victims of the habit, whether for the purpose of curing the habit or any other object, must be made, if made at all, by a pharmacist or druggist, and by them only upon a physician's prescription, under the safeguards imposed by law in respect to such sales;" that "the question whether

this particular drug was administered or furnished in good faith or not is immaterial;" that "the statute makes a distinction between the disposal, prescription and furnishing of these drugs to habitual users and to ordinary patients. \* \* \* In the case of patients not addicted, a physician is permitted in the usual course of his practice to prescribe them, and also to furnish them. As regards habitual users the statute first prohibits anybody from either furnishing or prescribing the drug to that class of people. But that is qualified by the permission to prescribe the drug in the case of a doctor, who in good faith having an addict under treatment for the cure of the habit sees fit to give him a prescription upon which he can procure the drug. He is forbidden, however, by this statute to furnish the drug himself."

Defendant questions these instructions. He claims that under section 2 a physician may both prescribe and furnish the drug to an addict if done in good faith and for purposes of treatment. The question of the correctness of this construction of the statute is the crucial question in the case.

We think the court correctly construed the statute. There is a plain difference between "prescribe" and "furnish." To prescribe is to give medical direction, to indicate remedies. To furnish is to supply or provide. This is the ordinary meaning of these terms. Both words are used, obviously with this distinction as to meaning, in the Federal Anti-Narcotic Law, Act of March 3, 1915, 38 St. 817. The context makes plain the intention to so use the words in our statute. In section 1 the word "prescription" is used repeatedly in the sense mentioned and with accurate direction as to the manner in which the prescription may be filled by a pharmacist. It is quite clear that the word "prescribe" was used in the same sense in section 2, and when that section first made it unlawful for a physician to "furnish to or prescribe for" the habitual user of the drug mentioned, and then provided that he might "prescribe" in good faith "for the use of" such habitual user, it used the term "prescribe" in ordinary sense, and it is used in that sense throughout the act. If we need look for the reason, it is doubtless found in the purpose to require two persons to be concerned in the supplying of narcotic drugs to addicts under the conditions as to publicity which the statute requires in case of prescriptions. In view of the strict requirements of section 1, as to the record to be kept by a physician administering the

drug to a patient not an addict, it is quite inconceivable that the legislature should have intended that a physician may furnish the drug to an addict without any safeguard or provision for record at all.

Defendant contends that all reasonable doubts as to construction are to be resolved in favor of the defendant and cites *State v. Walsh*, 43 Minn. 444, 45 N. W. 721. This is true enough, but "if the language be plain it will be construed as it reads." *Bolles v. Outing Co.* 175 U. S. 262, 20 Sup. Ct. 94, 44 L. ed. 156. The language is plain in this case.

3. It was competent for the state to introduce evidence of other sales of morphine to Chandler and of the sale of morphine to other drug addicts, in violation of the statute. Evidence of this character is admissible, if it is part of one plan or scheme carried on by defendant to wilfully violate the law, *State v. Ames*, 90 Minn. 183, 96 N. W. 330; *State v. Monroe*, 142 Minn. 394, 172 N. W. 313, or if it tends to show an inclination or predisposition to commit the offense charged. *State v. Hartung*, 141 Minn. 207, 169 N. W. 712. The evidence of other offenses received in this case was within the rule.

4. The court instructed the jury as follows: "Where a law is a new one and subject to misunderstanding and misinterpretation that is not a defense against a violation of the act. It is a matter which may properly be taken into consideration in determining what penalty should be imposed." This instruction might well have been omitted, yet what the court said was probably true. The construction of statutes is for the court. If a statute, beyond reasonable doubt, makes a certain act a crime, then a misinterpretation of the statute by a defendant is not a defense.

5. The refusal of the court to receive in evidence a stamp, with which defendant said he had stamped all containers of the drug which he may have furnished to patients, was not prejudicial error. The package found in Chandler's possession was not stamped. Defendant's claim is, that in view of defendant's testimony that he always affixed the stamp on every package dispensed, the stamp was admissible as tending to prove that the transaction testified to by Chandler never took place. The bearing of the evidence was very remote. In view of the fact that defendant admittedly furnished to Chandler the quantity of the drug found



in his possession, there could be no error in the rejection of this evidence.  
Judgment affirmed.

DIBELL, J. (dissenting).  
I dissent.

Brown, C. J., took no part.

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STATE v. SECURITY NATIONAL BANK AND OTHERS.  
FRANK P. HIXON AND OTHERS, APPELLANTS.<sup>1</sup>

August 29, 1919.

No. 21,278.

**Taxation of national bank stock — former decision followed.**

1. On a former hearing it was held that a national bank cannot, under our statute, be required to pay an assessment levied upon its stock, unless it has in its hands, earnings, or at least assets of some sort, belonging to the stockholders. It was further held that the stock involved in this case was subject to taxation for the year 1915. This decision is followed.

**Same — bank made collector of tax from stockholders.**

2. The tax in such case is not against the bank, nor in rem against the stock, but is a tax against the stockholder of the bank on account of the ownership of the stock, and the bank is constituted a tax collector to collect the tax from the stockholder.

**Liability of stockholder absolute.**

3. The tax is an absolute liability of the stockholder. Its vitality does not depend upon the contingency of the bank's having assets of the stockholder from which it may be required to make payment.

**Taxation — validity of personal judgment dependent on personal notice.**

4. Personal judgment may not be taken against the stockholder for the tax without personal service of citation upon him. Personal service of notice, in the assessment and the levy of taxes, is not essential to due process of law. But, in judicial proceedings, notice before judgment is a fundamental right. A personal judgment in tax proceedings has all the elements of a judgment in personam and personal notice is

<sup>1</sup>Reported in 173 N. W. 885.

essential to jurisdiction to render it. The bank is not the agent of the stockholder to receive service of such notice. The judgment rendered in this case against stockholders without personal notice or attachment of property was without jurisdiction and is void.

**Stockholders bound by tax assessed against the bank.**

5. A tax on stock assessed in the name of the bank is a valid tax and is binding as such upon the stockholders. The validity of any method of procedure for collection of the tax levied in this case, other than the method which was pursued, is not before the court for decision.

After the former appeal reported in 139 Minn. 162, 165 N. W. 1067, the case was tried before Hale, J., who made findings and ordered judgment against each stockholder of defendant national bank for such proportion of the total tax assessed, together with penalties and costs, as the number of shares of stock held by each on May 1, 1915, bore to the total number of shares outstanding on that date. The motions of Frank P. Hixon, Elizabeth W. Harrison, and of the administrators of the estate of H. M. Carpenter, deceased, appearing specially therein to object to the jurisdiction of the court over them and over that estate, to set aside the findings and conclusions as to them and to that estate, for the reason that the court had not jurisdiction over them, were denied. From the judgment entered pursuant to the order for judgment against the moving parties, they appealed. Reversed.

*Louis K. Hull and Lancaster & Simpson*, for appellants.

*Clifford L. Hilton*, Attorney General, *James E. Markham*, Assistant Attorney General, *William M. Nash*, County Attorney, and *Frank J. Williams*, Assistant County Attorney, for respondent.

**HALLAM, J.**

1. In March, 1915, the Security National Bank of Minneapolis negotiated a sale of its assets to the First National Bank of Minneapolis for \$5,000,000. The purchase price was placed as a credit on the books of the First National Bank to "the Security National Bank of Minneapolis in liquidation." As part of the same transaction it was agreed that the Security Bank should liquidate, that its stockholders should surrender their stock for cancelation and subscribe for part of a new issue of stock of the First National Bank, the new stock to be paid for out of the purchase price to be paid by the First National Bank for the

assets of the Security National Bank. The physical transfer of assets was made before May 1, and upon such transfer the Security Bank ceased doing a banking business, but the transaction was not closed until after May 1. The surrender of stock by the stockholders of the Security Bank, and the issuance of the new stock by the First National Bank, took place after that date. The result was that on May 1 the stock of the Security Bank was still outstanding in the ownership of its stockholders.

The Security Bank failed to return to the assessor its list of stockholders as banks are required by law to do. G. S. 1913, § 2018. The assessor assessed the \$5,000,000 on deposit as money and credits. On October 16, 1915, the Minnesota Tax Commission, after notice to the bank and a hearing, directed the county auditor of Hennepin county to assess the stock of the Security National Bank "in the manner provided by section 2018, G. S. 1913, for the current year as omitted property." The county auditor thereupon assessed the stock in the name of the bank. No list of stockholders was called for or returned. The assessment was not paid. The bank was held not liable for the payment of this tax, for reasons which will be hereafter more fully stated. *State v. Security Nat. Bank of Minneapolis*, 139 Minn. 162, 165 N. W. 1067.

On the second trial of the case the state called for a list of the stockholders of the bank, with the amount of stock held by each on May 1, 1915, and this was produced in court by the attorneys for the bank, with the stipulation that, by its production, no rights were waived. The court then, without citation or notice to any of the persons named on the list, ordered personal judgment against each of them for a proportion of the tax. Thereafter certain of the persons named as stockholders appeared specially, and moved to vacate the decision, on the ground that the court had no jurisdiction to give personal judgment against them. The motion was denied and they appealed.

The pertinent statutes are as follows:

Section 2018 provides that: "The stock of every bank \* \* \* organized under the laws of this state or of the United States, shall be assessed and taxed in the town, city or village where such bank \* \* \* is located, whether the stockholders of such bank reside in such place or not, and shall be assessed in the name of the bank."

Section 2019 provides that: "In every bank \* \* \* there shall be kept at all times a full and correct list of the names and residences of

the stockholders or owners or parties interested therein, showing the number of shares, and the amount held, owned or controlled by each party interested, \* \* \* and the accounting officer of each bank \* \* \* shall furnish to the assessor a duplicate copy of such list, verified by oath, which shall be returned and filed with the county auditor."

Section 2021 provides that: "To secure the payment of taxes on \* \* \* bank stock \* \* \* every bank \* \* \* shall, before declaring any dividend, deduct from the annual earnings of the bank such amount as may be necessary to pay any taxes levied upon the shares of the stock, and such bank \* \* \* shall pay the taxes, and shall be authorized to charge the amount of such taxes paid to the expense account of such bank."

This court held on the former appeal that the stock was a taxable asset on May 1, 1915. We have no misgivings as to the correctness of this ruling. The stock was a very valuable asset and continued to be such, until, by contemporaneous transactions, it was surrendered and canceled, and the stock in the First National Bank was issued. There was no point of time at which it could be said that neither one nor the other was in existence. On May 1 the stock in the First National Bank was not taxable because it had not come into existence. The stock in the Security Bank was still in existence and it was taxable.

On the former appeal it was held that the bank was not liable for the tax on the ground that a bank is liable to pay taxes levied on its stock only out of earnings, at least out of assets of some sort, belonging to the stockholders and in the hands of the bank, and that the Security Bank had no such earnings or assets in its possession at any time after this tax levy was made.

2. The contention is now made that the stockholders are not liable for the payment of this tax. This involves an inquiry as to the nature of the tax. Clearly the tax must fall within one or the other of three classes. It must be a tax against the corporation, or a tax in rem against the stock, or a tax against the stockholders on account of the ownership of the stock.

It is clearly not a tax against the bank. A state legislature has no power to tax the capital of a national bank. *National Bank v. Commonwealth*, 9 Wall. 353, 19 L. ed. 701; *Owensboro Nat. Bank v. Owensboro*,

173 U. S. 664, 19 Sup. Ct. 537, 43 L. ed. 850, and this court has held that our legislature has not, by this statute, attempted to do so. *State v. Security Nat. Bank of Minneapolis*, 139 Minn. 162, 165 N. W. 1067. Nor is there any manifestation of intent to tax the bank for the property of the stockholder.

The tax is not in rem against the stock. In this state real estate taxes are in rem against the land. Personal property taxes are not in rem, but are in personam against the taxpayer. *Laird Norton Co. v. County of Pine*, 72 Minn. 409, 412, 75 N. W. 723; *State v. Eberhard*, 90 Minn. 120, 95 N. W. 1115. This tax is of the same character as other taxes upon personal property. This court has so held. *State v. Barnesville Nat. Bank*, 134 Minn. 315, 159 N. W. 754; *State v. Security Nat. Bank of Minneapolis*, 139 Minn. 162, 165 N. W. 1067.

This method of taxation of stock in banks is in vogue in many states. In some states, the tax is levied, in form, in the name of the stockholder, *Nevada Nat. Bank v. Dodge*, 119 Fed. 57, 56 C. C. A. 145; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189; *Corry v. Baltimore*, 196 U. S. 466, 25 Sup. Ct. 297, 49 L. ed. 556; see *Merchants & Mnfrs. Bank v. Pennsylvania*, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. ed. 236, as it formerly was in this state. G. S. 1878, c. 11, § 24. In some, the tax is levied in form, in the name of the bank. *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. ed. 1069; *National Bank v. Commonwealth*, 9 Wall. 353, 19 L. ed. 701; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. ed. 892. In some, the provision is simply for taxation of the shares of stock. *National Bank v. Commonwealth*, 9 Wall. 353, 19 L. ed. 701; *Citizens Nat. Bank v. Kentucky*, 217 U. S. 443, 30 Sup. Ct. 532, 54 L. ed. 832.

In all of these cases the result is the same. It is in substance a tax against the stockholders on account of the ownership of the stock, and the bank is constituted a tax collector to collect the tax from the stockholders.

3. The contention is made, that whatever the nature of the tax, there is no liability for its payment, except under section 2021, out of earnings in the hands of the bank, and that if the bank has no such assets of the stockholders in its hands, there is no liability resting upon anyone to pay, and the state must lose the tax. The contention is far-reaching. If sustained, it would not only relieve the stockholders in a case like this,

where the bank has paid over all of its earnings and divided all of its assets among its shareholders, but it would relieve the stockholders of every bank which for the time being does not make earnings. Perhaps the state could by statute accomplish this result. We should not be easily convinced that any such result was intended. Taxpayers, generally, are required to pay taxes on their personal property whether their business prospers or not. We need not look for the affirmative provisions making the payment of the tax an absolute liability. Absolute liability is the rule and it is to be presumed. It should require clear language to relieve stockholders from taxation upon their stock in the event the corporation has made no earnings, or, having made them, has paid them over to the stockholders. We do not think the statute evinces such an intention. The provision, requiring the bank to make payment under the conditions stated in section 2021, is, as the language of that section states, "to secure the payment" of the tax, that is, to furnish assurance that the state will receive payment of the tax. In our opinion it is only security for the payment of the tax, and does not relieve the stockholder from payment in the event the bank has no funds of the stockholder with which to pay his tax for him. The proceeding by which the bank is required to pay the tax of the stockholder has been likened to a proceeding in garnishment. *National Bank v. Commonwealth*, 9 Wall. 353, 362, 19 L. ed. 701; *State v. Security Nat. Bank of Minneapolis*, 139 Minn. 162, 165 N. W. 1067. The analogy may be carried this step farther; as in the case of garnishment the proceeding assumes a principal liability.

The contention is made that the statute provides no means of enforcing the tax against the stockholder. If this were true it might lend color to the argument that no such liability is intended, but we are not prepared to hold that our tax laws are inadequate for the collection of this tax from the stockholder.

But we cannot sustain the judgment against these appellants because it was given without notice to them. Counsel for the state contends, and the trial court held, that judgment may be entered against the persons whose names are returned by the bank as stockholders, without service of notice upon them, on the theory that the bank represents them, and that service upon the bank is service upon them.

We cannot sustain this position. We are of the opinion that the court acquired no jurisdiction to render a personal judgment against the stock-

holders. Counsel for the state contends that personal service of notices is not considered an essential to due process in respect to taxation. This is true as to the assessment and levy of taxes. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 239, 10 Sup. Ct. 533, 33 L. ed. 892; *Merchants' & Mfr's. Bank v. Pennsylvania*, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. ed. 236. But it has never been held that a personal judgment may be obtained in a tax proceeding without personal notice. "There are certain fundamental rights which our system of jurisprudence has always recognized \* \* \* one of these is notice before judgment in all judicial proceedings." *Bardwell v. Collins*, 44 Minn. 97, 46 N. W. 315, 9 L.R.A. 152, 20 Am. St. 547; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Baker v. Baker, Eccles & Co.* 242 U. S. 394, 37 Sup. Ct. 152, 61 L. ed. 386. A judgment in personal tax proceedings possesses all the elements of any judgment in personam. It is enforceable by execution. Personal notice is as essential to give jurisdiction to render a personal judgment in a tax proceeding, as in any other case.

In *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189, cited by the state, the court used language to the effect that all owners of stock in banks "have," by becoming owners, "submitted themselves to the jurisdiction of the state." But we think the court referred to jurisdiction "for purposes of taxation" and not to jurisdiction for the purpose of obtaining judgment against the person. The court made this clear when it said: "If the state has actual jurisdiction of the person of the owner, it operates directly upon him. If he is absent, and it has jurisdiction of his property, it operates upon him through his property."

In *Corry v. Baltimore*, supra, the court sustained the power of the state to impose a personal liability upon the owner. But there is a difference between imposing a personal liability upon the owner and the enforcement of that liability by giving personal judgment against one alleged to be the owner without notice to him. The application for a judgment against the stockholders involves something more than the validity of the tax. For example, it involves the question whether the person named is in fact a stockholder, and this question cannot be determined against him, without an opportunity to be heard, in a proceeding to enforce payment of the tax, any more than it could be in an action to enforce the liability of stockholders for the debts of the corporation. See *Wilson v. Seligman*, 144 U. S. 41, 12 Sup. Ct. 541, 36 L. ed. 338. Nor

does our statute, either expressly or by implication, attempt to confer upon the corporation the agency to receive service of notice in an action to obtain personal judgment against the stockholder, or to represent or defeat his interest in such an action. The judgment rendered against appellants without personal notice or attachment of property was without jurisdiction and is void.

5. But it does not follow, as counsel for the state seems to fear, that, if their contention is not sustained, the power of the state to collect the tax must fail. There is no doubt that a tax on stock assessed in the name of the bank, is a valid tax, and is binding as such upon both the bank and its stockholders. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. ed. 892; *Merchants' & Mfrs.' Bank v. Pennsylvania*, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. ed. 236; *Nevada Nat. Bank v. Dodge*, 119 Fed. 57, 56 C. C. A. 145; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189; *James Clark Distilling Co. v. Cumberland*, 95 Md. 468, 52 Atl. 661; *Corry v. Baltimore*, 196 U. S. 466, 25 Sup. Ct. 297, 49 L. ed. 556, and we commend the language of Justice Mitchell in *County of Redwood v. Winona & St. Peter Land Co.* 40 Minn. 512, 517, 41 N. W. 465, 42 N. W. 473, as follows: "The taxing power, when acting within its legitimate sphere, is one which knows no stopping-place until it has accomplished the purpose for which it exists, viz., the actual enforcement and collection from every lawful object of taxation of its proportionate share of the public burdens; and, if prevented by any obstacles, it may return again and again until, the way being clear, the tax is collected." The validity of any method of procedure, save that pursued in this case, has not been argued or presented by the record, and we refrain from making our decision broader than the issues presented.

Judgments reversed.

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## TRACY CEMENT TILE COMPANY v. CITY OF TRACY.<sup>1</sup>

September 12, 1919.

No. 21,377.

Municipal contract — charter provision applicable.

1. A provision of a city charter that, "every ordinance, order or res-

<sup>1</sup>Reported in 176 N. W. 139.



olution, appropriating money, creating any liability of the city, awarding or approving of any contract for the payment of money \* \* \* shall require a four-fifths vote of all the members of the city council," applies to a contract creating an obligation on the part of the city to furnish steam for power. Such a contract authorized by three of five councilmen is of no effect.

**Same — ratification by city council.**

2. Such a contract, being one which the city had power to make, may be subsequently ratified. Ratification can only be by the city council acting as a body. It may be effected by any action or contract which gives to the contract the stamp of approval and this may be done by acquiescence with knowledge of the facts.

**Same — evidence insufficient.**

3. The evidence of ratification in this case is insufficient. There is no evidence of knowledge on the part of the absent members of the terms of the contract.

Action in the district court for Lyon county to recover \$3,817.66 for breach of contract. The answer alleged among other matters that the execution of the contract by defendant city was not authorized by any of the provisions of the city charter or the laws of Minnesota, and defendant had no power or authority to enter into or execute such contract. The case was tried before Olsen, J., who when plaintiff rested denied defendant's motion to dismiss the action, and at the close of the testimony defendant's motion for a directed verdict, and a jury which returned a verdict for \$962.40. Defendant's motion for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Reversed.

*A. R. English*, for appellant.

*E. B. Korns and Seward & Molls*, for respondent.

**HALLAM, J.**

The city of Tracy, for some years, operated a municipal water and light plant, using steam for power. In October, 1911, it entered into a contract with plaintiff, by which it agreed to furnish plaintiff the exhaust steam from its plant for a period of three years at \$20 a month. Upon the expiration of this contract negotiations were begun for a new contract and in October, 1914, a new contract was entered into for three

years at \$30 a month. The city continued to furnish its exhaust steam until November, 1915, at which time it sold its water and light plant to a private corporation. This corporation continued to furnish plaintiff the exhaust steam from the plant until July 1, 1916. At that time it installed an oil engine to provide power for its plant and after that time no exhaust steam was furnished. Thereafter plaintiff sued the city for damages for breach of its contract in failing to furnish steam for the balance of the three-year period covered by the 1914 contract. Plaintiff had a verdict for \$962.40. Defendant appeals.

1. The city charter of the city of Tracy contains this provision: "Every ordinance, order, or resolution, appropriating money, creating any liability of the city, awarding or approving of any contract for the payment of money \* \* \* shall require a four-fifths vote of all the members of the city council."

The contract sued on was clearly a contract creating a "liability of the city." It seems clear that an "ordinance, order, or resolution" authorizing such a contract must, under the terms of the charter, receive a four-fifths vote of all members of the council. The city council is composed of five members. The only action taken was as follows: On October 13, 1914, a "motion" was "made and carried that the mayor and recorder enter into a contract with the Cement Tile Co. for exhaust steam for a period of three years at \$30.00 per mo." Only three members of the council were present so the motion could not receive a four-fifths vote. The action of those present was of no effect. It was as though no action had been attempted at all. Nevertheless the mayor and recorder entered into a contract to furnish exhaust steam for a period of three years and also to furnish electricity for light and power for the same period.

2. The contention is made that the contract, though not authorized, was subsequently ratified. The trial court took this view, and instructed the jury as a matter of law that, "by performing the contract and receiving the benefits therefrom for more than a year without objection, the city must be held to have ratified the contract and the contract must be held to be a valid contract." Whether the contract was ratified is the question now presented.

This was a contract which the city had the power to make. It is well settled that a municipal contract which a municipality has the pow-

er to make, may, although unauthorized, be ratified. *Bell v. Kirkland*, 102 Minn. 213, 113 N. W. 271, 13 L.R.A.(N.S.) 793, 120 Am. St. 621. Naturally it can be ratified only by the body which had the power to originally authorize it, that is, in this case, by the city council.

What constitutes ratification is a matter upon which courts have differed. A contract which the city had no power to make cannot, of course, be ratified at all. *Bell v. Kirkland*, *supra*; *Newbery v. Fox*, 37 Minn. 141, 33 N. W. 333, 5 Am. St. 830; *Andrews v. School District No. 4*, 37 Minn. 96, 33 N. W. 217. When a contract which a municipality has the power to make has been performed, with the acquiescence of the municipality, and the municipality has received the benefit, it has been held that recovery may be had on quantum valebant. *Laird Norton Yards v. City of Rochester*, 117 Minn. 114, 134 N. W. 644, 41 L.R.A.(N.S.) 473; *First Nat. Bank of Goodhue v. Village of Goodhue*, 120 Minn. 362, 139 N. W. 599, 43 L.R.A.(N.S.) 84. This rule does not help us much here. If the statutes require that the contract be in writing, *Leland v. School District No. 28*, 77 Minn. 469, 80 N. W. 354, or that it be authorized by ordinance, *Paul v. Seattle*, 40 Wash. 294, 82 Pac. 601, or by resolution, *Nash v. City of St. Paul*, 23 Minn. 132, 137, or only at a meeting called in a specific manner, *Currie v. School District No. 26*, 35 Minn. 163, 27 N. W. 922, or that the contract be made in some specific manner, *Smith v. City of Newburgh*, 77 N. Y. 130; *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 7 Sup. Ct. 865, 30 L. ed. 923, such requirements are mandatory and cannot be waived, and ratification cannot be accomplished without compliance with them. So where there is a requirement of some preliminary, as a preliminary estimate, *City of Plattsmouth v. Murphy*, 74 Neb. 749, 105 N. W. 293, or a preliminary application, *Gutta-Percha & R. Mnfg. Co. v. Village of Ogalalla*, 40 Neb. 775, 59 N. W. 513, 42 Am. St. 696; *City of Kearney v. Downing*, 59 Neb. 459, 81 N. W. 509; *McDonald v. City of New York*, 68 N. Y. 23, 23 Am. Rep. 144, and this has been omitted, there can be no ratification without it.

Aside from cases of character similar to the foregoing, it may be safely said that a city may, directly or indirectly, ratify a contract, which it might have authorized in the first instance. Action by the proper municipal body, such as approving bills arising under the contract, *Schmidt v. County of Stearns*, 34 Minn. 112, 24 N. W. 358; *Pe-*

terson v. County of Koochiching, 133 Minn. 343, 158 N. W. 605; Cunningham v. Saling, 57 Ore. 517, 112 Pac. 437, 37 L.R.A.(N.S.) 1051; Meehan v. Parsons, 271 Ill. 546, 111 N. E. 529, or other subsequent action recognizing the contract as a valid and subsisting one, State v. District Court of Hennepin County, 33 Minn. 235, 22 N. W. 625; Swenson v. Village of Bird Island, 93 Minn. 336, 101 N. W. 495, is sufficient.

Some decisions hold that mere acquiescence of the proper municipal body after knowledge of the facts is sufficient, as where an attorney conducts litigation for the city with full knowledge and acquiescence of the city council, Town of Bruce v. Dickey, 116 Ill. 527, 6 N. E. 435; or a teacher performs services for a school district under similar circumstances, Athearn v. Independent District of Millersburg, 33 Iowa, 105, or work is done under a building contract under similar circumstances, Bellows v. District Township of West Fork, 70 Iowa, 320, 30 N. W. 582; Ettor v. Tacoma, 77 Wash. 267, 137 Pac. 820; or the contract is reported to the proper body and is acquiesced in, but without vote taken, Norwalk Gaslight Co. v. Borough of Norwalk, 63 Conn. 495, 28 Atl. 32. See also 2 Thompson, Corp. § 2019.

Other courts hold that, where corporate action is required in the first instance, the ratification must be by corporate action of the municipal body acting as such, Texarkana v. Friedell, 82 Ark. 531, and must have all the elements requisite for original authorization, Caxton Co. v. School District, 120 Wis. 374, 98 N. W. 231, 106 Am. St. 931; Chippewa Bridge Co. v. Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. 931; Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Taylor v. District Township of Wayne, 25 Iowa, 447; Mulligan v. Lexington, 126 Mo. App. 715, 105 N. W. 1104; Tiedeman, Mun. Corp. § 170; 2 Dillon, Mun. Corp. (5th ed.) § 797, note 1; McQuillin, Mun. Corp. § 1258; 28 Cyc. 676-677; Monett Elec. L. P. & Ice Co. v. City of Monett, 186 Fed. 360, a strong case.

As applied to the facts of this case we think the law is, that the city charter required action of the city council by a four-fifths vote to authorize this contract; that ratification can only be by the city council acting as a body; that such ratification may be effected by any action or conduct of the council as such which gives to the contract its stamp of approval, and that this may be done by acquiescence. Ratification of course presupposes knowledge of the facts, either directly communi-

cated, or at least present in the minds of the members of the council when acting officially.

3. The only evidence of ratification is that the city furnished exhaust steam as the contract provided, and plaintiff paid the price stipulated in the contract for more than one year after the contract was made. It also appears that, on some preliminary negotiation at which all councilmen were present, plaintiff's representatives asked for a renewal of the contract for three years. But it does not appear that the terms of the contract actually made were ever brought to the attention of the two members who were not present when the vote was taken. A majority of the court are of the opinion that the evidence of ratification is insufficient, and particularly that there is no evidence from which we may infer knowledge on the part of the absent members of the terms of the contract and no acquiescence by the council in the contract which was in fact made.

Judgment reversed.

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**RICHARDSON GRAIN SEPARATOR COMPANY v. EAST  
HENNEPIN STATE BANK.<sup>1</sup>**

October 10, 1919.

No. 21,317.

**Bank and banking — collection of out-of-town check.**

1. Defendant is an outlying bank in Minneapolis. Plaintiff deposited a Chicago check for collection. Defendant had no Chicago correspondent. Plaintiff knew it. Defendant forwarded the check to Chicago through a Mankato bank. When presented for payment the payee bank had closed its doors. Had it been presented a day earlier it would have been paid. It was customary for outlying Minneapolis banks without Chicago correspondents to forward Chicago checks for collection through central Minneapolis banks. Had this been done in the customary way no time would have been gained.

**Check to be forwarded within reasonable time — customary speed.**

2. A check is intended for payment, not for circulation. A collecting bank must forward out-of-town checks for collection within a reasonable time and by a reasonably direct route. The usual commercial route is sufficient. The customary speed of banks similarly situated is all the check holder may expect.

**No liability unless time is lost.**

3. No liability arises from forwarding a check from Minneapolis to Chicago through a bank in Mankato where no time is lost thereby.

<sup>1</sup>Reported in 174 N. W. 415.

**Conversation between parties immaterial.**

4. Plaintiff's president was an officer in defendant bank. A conversation between him and another officer of defendant, both acting as such, as to a proposed manner of handling Chicago checks, gives rise to neither contract, representation, nor estoppel, so far as plaintiff is concerned.

Action in the district court for Hennepin county to recover \$688.83 for negligence in collecting the amount of a check. The answer alleged that defendant forwarded the check in the usual course of business to the city of Chicago through its correspondent and in so doing exercised ordinary care and diligence, and that the failure of the bank in Chicago upon which said check was drawn to pay the same did not occur through any fault or negligence on the part of defendant; quoted the condition printed on plaintiff's deposit book to the effect that defendant bank in receiving collections acts only as the agent of the depositor and does not assume any responsibility beyond due diligence on its part. The answer further alleged that the officer of plaintiff who mailed the check to defendant was a vice president of defendant bank at the very time of doing so, and was familiar with the manner in which defendant sent checks and drafts to Chicago for collection. The reply alleged that the vice president was not a practical banker and did not assume any part in the management of the bank and had no knowledge of the method of defendant in forwarding its checks to Chicago for collection. The case was tried before Rockwood, J., who made findings and ordered the action dismissed with prejudice. From an order denying its motion for amended findings, conclusions of law and order for judgment, or for a new trial, plaintiff appealed. Affirmed.

*Charles F. Keyes*, for appellant.

*John N. Berg*, for respondent.

HALLAM, J.

This action is brought against defendant bank to recover damages for delay in presentment of a check for payment. The court found that defendant exercised due diligence in handling the check and gave judg-

ment for defendant. The question on this appeal is, does the evidence sustain this finding.

1. The check was drawn by a Chicago firm on a Chicago bank and in favor of plaintiff, a Minneapolis corporation. Plaintiff received the check at Minneapolis by mail June 25, 1917. The same day plaintiff mailed the check to defendant, a small "outlying bank" in Minneapolis, as the court found, for "collection and credit." Defendant received it on the morning of the twenty-sixth. Defendant "undertook its collection" and on the same day mailed it to the First National Bank of Mankato for collection. It arrived there June 27. The same day the Mankato bank mailed it to the First National Bank of Chicago for collection. That bank received it June 28 and presented it for payment June 29. At an earlier hour on that day the drawee bank closed its doors. The drawer of the check had funds in the bank, and had the check been presented a day earlier it would have been paid.

Had defendant had a Chicago correspondent, it might have forwarded the check direct to Chicago on June 26 and thus saved a day. But it did not have a Chicago correspondent. Plaintiff knew that fact. Mr. Thorbus, plaintiff's president and sole manager, was also vice president and a director of defendant bank, and had been its president. The usual method of collecting Chicago checks, by a Minneapolis bank without a Chicago correspondent, was through the medium of a bank that had a Chicago correspondent. The Mankato bank was such a bank. There were a number of such banks in Minneapolis. The Northwestern National was one such. Defendant "cleared" its local checks through this bank. Had it sent this check by special messenger to the Northwestern National before three p. m., June 26, the check would have been forwarded to Chicago on that day and a day saved. But there is evidence that it was not usual banking custom to do this. The usual custom, when an outlying bank in Minneapolis desired to employ a central bank to collect out-of-town checks, was to transmit them to the central bank by messenger on the morning of the day following their receipt. It is apparent therefore that if this check had been handled through the Northwestern National Bank of Minneapolis, and in the usual way of handling checks through central Minneapolis banks, it would not have arrived in Chicago any earlier than it in fact did.

2. The Negotiable Instruments Act does not help us. It prescribes the duty of the holder of a check, G. S. 1913, §§ 5998, 6005, but not the duty of a collecting bank. The rules applicable in the two cases are not necessarily the same. *Morse, Banking*, § 238.

A check is intended for payment and not for general circulation. *Gifford v. Hardell*, 88 Wis. 538, 60 N. W. 1064, 43 Am. St. 925; *Parker v. Reddick*, 65 Miss. 242, 3 South. 575, 7 Am. St. 646; *Fegley v. McDonald*, 89 Pa. 128; *Gordon v. Levine*, 194 Mass. 418, 80 N. E. 505, 10 L.R.A.(N.S.) 1153, 120 Am. St. 565, 10 Ann. Cas. 1119. When a bank receives a check for collection it must use due diligence in presenting it for payment. If drawn on a bank in another city it must forward it for collection within a reasonable time. Some authorities state that to present or forward it for presentment on the day following its receipt is, as a matter of law, due diligence. *Morse, Banking*, § 238; *Martin v. Home Bank*, 30 App. Div. 498, 52 N. Y. Supp. 464. This rule has the virtue of certainty, but we doubt the advisability of adopting this arbitrary standard. Whether this is due diligence is a question of fact rather than of law. It appears to be the practice of the Minnesota banks here concerned, in forwarding out-of-town checks by mail, to forward them on the same day they are received. See also *Morse, Banking*, § 242.

When a bank receives an out-of-town check for collection, it must forward it for presentment by a reasonably direct and not a circuitous route. See 8 C. J. 543; *Gregg & Co. v. Beane*, 69 Vt. 22, 37 Atl. 248; *First Nat. Bank v. Miller*, 43 Neb. 791, 62 N. W. 195. The usual commercial route is sufficient. *Sublette Exchange Bank v. Fitzgerald*, 168 Ill. App. 240. When the holder of a check utilizes the agency of a bank to make his collections, he may expect the customary speed of banks and no more, see *Plover Savings Bank v. Moodie*, 135 Iowa, 685, 110 N. W. 29, 113 N. W. 476, and when he employs, for the purpose of collecting a Chicago check, an outlying bank known by him to have no Chicago correspondent, he has a right to expect only the customary speed of banks similarly situated.

3. Complaint is made that this check was forwarded by a circuitous route. If time had been lost by the relaying of this check through Mankato we should hesitate to hold that such conduct was due diligence.



But as above indicated no time was lost by this method. The use of an improper method entails no liability if no damage is done. *First Nat. Bank v. Buckhannon Bank*, 80 Md. 475, 31 Atl. 302, 27 L.R.A. 332.

4. Plaintiff relies somewhat on a conversation alleged to have taken place before the organization of defendant bank between Mr. Thorbus who was then its prospective president and Mr. Preus, its prospective vice president, in which the desirability of a Chicago account was discussed and in which Mr. Preus is alleged to have said that it was not necessary to have a Chicago correspondent to collect Chicago checks, but that such checks could be "shot over" to a central Minneapolis Bank and gotten into Chicago just as quickly as though sent to a correspondent bank in Chicago. We do not attach as much importance to this conversation as does plaintiff. There is no suggestion that in this conversation Mr. Thorbus was in any sense acting for plaintiff. As a prospective officer of the bank he was discussing with a prospective fellow officer matters of policy in connection with the management of the bank. There was neither contract, representation, nor estoppel, as far as plaintiff was concerned.

The method employed by the bank was found by the court to be reasonable. We think this finding is sustained. In the absence of special arrangement the use of this method was sufficient. No special arrangement was made.

Order affirmed.

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IN THE MATTER OF THE APPEAL OF PETER BURG FROM  
THE DETERMINATION OF THE TOWN BOARD OF THE  
TOWNSHIP OF ROSEDALE, MAHNOMEN COUNTY,  
MINNESOTA.

PETER BURG v. TOWNSHIP OF ROSEDALE.<sup>1</sup>

October 10, 1919.

No. 21,365.

**Highway — assessment of benefits from condemnation — drainage.**

Upon a trial to determine the amount of benefits to which a landowner

<sup>1</sup>Reported in 174 N. W. 309.

is entitled for the taking of a portion of his farm for a public highway, the benefit flowing to such land from drainage may be considered and offset against the value of the land taken when the proof is sufficiently certain and direct.

The supervisors of the town of Rosedale in Mahanomen county laid out a town road and it was constructed. The facts are stated in the first paragraph of the opinion. Peter Burg appealed from the assessment of benefits and damages to the district court for that county, where the appeal was heard by Grindeland, J., and a jury which found in favor of respondent town. From an order denying appellant's motion for judgment notwithstanding the verdict or for a new trial, Peter Burg appealed. Affirmed.

*P. H. Schroeder*, for appellant.

*Clayton C. Cooper*, for respondent.

QUINN, J.

Appellant is the owner of the west one-half of the southwest quarter of section 30 in the town of Rosedale, Mahanomen county, upon the south line of which was a slough unfit for cultivation. In 1915 the town board of Rosedale attempted to lay out and establish a public highway on the south line of that section, and, during the fall of 1917, entered into a contract for the grading of a road across such slough. While this work was under way appellant procured an order from the district court restraining the town and its officers from proceeding further, upon the theory that the proceedings for the establishment of such highway were defective and void. Subsequently a subcontractor, through some inadvertence, did further work in the way of grading the road, so that it was thereafter used and traveled by the public. In the spring of 1918, a new petition was filed and the town board established a highway four rods wide upon the same line, the restraining order being still in force. In establishing the highway under the second petition the board determined that the benefits offset the damages which the highway would cause to appellant's land. Appellant appealed from the assessment to the district court where the matter was tried to a jury and a verdict returned in favor of the respondent. From an order denying his motion

for judgment in his favor notwithstanding the verdict, and if that be denied for a new trial, appellant appealed.

The record presents but one question for determination here, viz.: Was the question of benefits properly submitted to the jury? We answer the query in the affirmative. As bearing upon this phase of the case the trial court instructed the jury that: "One of the questions for you to determine is, does this road as now constructed benefit appellant's land by draining it? When I say this road, it includes the road ditches of the road in question. It is for you to determine whether the appellant has received any special benefits from the laying out of the road, and in arriving at such special benefits you should not take into consideration the general advantages which the owner would enjoy in common with the rest of the community. A general rule is that the amount of benefits or damages shall be estimated by you, taking the fair market value of the farm of the appellant without the road and the fair market value of his farm with the road, without taking into consideration the general benefits to the community, and if you find that his farm is worth as much or more with this road laid out, you are to find for the respondent in this action. But should you find that appellant's damages are greater than his benefits then you should give appellant a verdict for the difference."

The rule adopted in *Swenson v. Board of Suprs. of Town of Hallock*, 95 Minn. 161, 103 N. W. 895, relied upon by appellant, is not controlling under the proofs in the case at bar. In that case it was held that proof of a local custom of a town to improve roads as rapidly as possible, and judicial notice of a general custom to construct roads so as to afford some drainage, is not sufficient evidence to establish benefits to lands abutting upon such highway. In the case at bar, the road in question, at the time of the trial, had been graded and the work of drainage completed. The effect upon the adjoining land which the grading and ditching would have, could be shown and determined to a certainty. The evidence warranted the submission of the question of benefits by drainage to the jury. That phase of the case was clearly and fairly submitted to the jury and there was ample evidence to sustain the findings. The question of misconduct of counsel is not within the record.

**Affirmed.**

ELIZABETH AMY, AN INSANE PERSON, BY W. B. COAKLEY,  
GUARDIAN v. WALLACE-ROBINSON LUMBER  
COMPANY AND ANOTHER.<sup>1</sup>

October 10, 1919.

No. 21,379.

**Judgment notwithstanding verdict — when not warranted.**

Where the prevailing party has adduced direct and positive testimony of the existence of facts, which, if found true by the jury, clearly call for the verdict rendered, the opposing litigant is not entitled to judgment notwithstanding, unless such testimony is demonstrably false and it is made to appear that the defect in the proof could not be remedied on another trial.

Action in the district court for St. Louis county to recover \$7,600 for timber cut and removed from plaintiff's land. The case was tried before Fesler, J., who at the close of the testimony denied defendants' motions for directed verdicts in their favor, and a jury which returned a verdict for \$1,020.64. Defendants' motion for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the verdict, defendants appealed. Affirmed.

*John H. Norton*, for appellants.

*Washburn, Bailey & Mitchell*, for respondent.

HOLT, J.

Defendants appeal from a judgment awarding plaintiff damages for timber trespass. The only ground assigned for reversal of judgment is that the court erred in denying defendants' motion for judgment notwithstanding the verdict, and that depends upon whether the evidence reasonably justifies a verdict for plaintiff or requires one in defendants' favor.

Plaintiff owned two forties of land a few miles south of Buhl upon which, it is claimed, the defendants, in the winter of 1914 and 1915,

<sup>1</sup>Reported in 174 N. W. 433.

entered, cut and removed the merchantable timber. She had been such owner since previous to 1910, subject to an outstanding permit to take off the timber, which expired in 1912. There is ample and direct evidence to the effect that defendants during the winter of 1914 and 1915 logged this land in connection with 18 other forties, then admittedly logged by them in the vicinity, some of which adjoined plaintiff's. A section line road, running north and south, separated her two forties. In the fall of 1914 one of the two men who had bought the forty immediately south of plaintiff's east forty built and took possession of a house thereon. He, his wife, young sons and their companions testified positively to the logging operations of defendants upon plaintiff's land. So did parties who lived on the forty directly north of plaintiff's west forty, and others who then had occasion to travel over the road mentioned and pass over the land involved. There is nothing in the testimony thus given for plaintiff which warrants an appellate court in holding that the jury should not have accepted the same as true. The defendants directed their most persuasive evidence to proving that in the winter of 1910 and 1911 all merchantable timber on plaintiff's two forties was cut and removed by loggers working for the owner of the timber permit mentioned, and hence there could have been no timber to remove in 1914 and 1915. This evidence was given by persons who also had had such opportunities of knowing whereof they testified that the divergence from that of plaintiff's, above alluded to, cannot well be explained upon the theory of innocent mistake.

The testimony produced by plaintiff in effect flatly contradicts that of defendant on the very subject matter of the cause of action. There was irreconcilable conflict also between the expert witnesses of the parties as to what the stumps disclosed as to the time of the cutting. For each side the trend of the testimony was that the cutting which each undertook to prove was of the virgin timber, that is, there had been no previous logging of any consequence on the land. It perhaps was significant to the jury that the defendant who had actual charge of the logging on the ground in 1914 and 1915 absented himself from the trial and that the men who worked in the timber that season were not produced as witnesses, with the exception of a foreman whose testimony

in the former trial was read to the jury. Under this condition of the evidence, we think the trial court was clearly right when stating that under the pertinent rules of law the verdict had ample support. It is a case peculiarly within the province of the jury to determine which of two contradictory versions of what has occurred is the true one, especially where, as here, the number of disinterested witnesses is about equal on each side.

The rule is that judgment notwithstanding the verdict should not be ordered, where there is a clear conflict in the evidence upon a material issue. *Hess v. Great Northern Ry. Co.* 98 Minn. 198, 108 N. W. 7, 803; *Berghuis v. Schultz*, 119 Minn. 87, 137 N. W. 201. It should not be ordered unless the evidence is practically conclusive against the verdict. 2 *Dunnell*, Minn. Dig. § 5082. The verdict here is not based on attenuated inferences from facts testified to, but must be regarded as resting upon the veracity of witnesses who related what they actually saw defendants' logging crew do upon plaintiff's land in the winter of 1914 and 1915. There was no suggestion that any other parties cut any timber in that vicinity during that season. The case does not come within the decisions of *Baxter v. Covenant Mut. Life Assn.* 81 Minn. 1, 2, 83 N. W. 459, or *Gorgenson v. Great Northern Ry. Co.* 138 Minn. 267, 164 N. W. 904, cited by defendants. Where the prevailing party has adduced direct and positive testimony of the existence of facts which, if found true by the jury, clearly call for the verdict rendered, the opposing litigant is not entitled to judgment notwithstanding, unless such testimony is demonstrably false and it is made to appear that the defect in the proof could not be remedied on another trial.

The action has been tried twice, resulting each time in a verdict for plaintiff. The trial court, in the memorandum appended to the order denying the motion for judgment, stated that had either party asked for a new trial he would gladly have granted it. Neither party saw fit to so do. It may well be that the verdict is so small when compared with what the evidence would justify that it either indicates such an injustice to plaintiff or such a compromise of the rights of defendants

that a new trial should have been had. But that does not justify this court to give judgment for defendants, nor does it authorize a retrial not asked for.

The judgment is affirmed.

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EINAR HOIDALE v. C. M. COOLEY.  
NORTHERN AMERICAN LIFE AND CASUALTY  
COMPANY, INTERVENER.<sup>1</sup>

October 10, 1919.

No. 21,386.

**Action on promissory note — intervention by insurance company — premium note.**

1. An insurance agent, to whom policies were intrusted for delivery to an applicant for insurance on payment of the first premium in cash, disobeyed instructions, delivered the policies and took the applicant's notes payable to the applicant and indorsed in blank. An assignee of the notes after maturity sued on them. The insurance company claimed the notes as its own and intervened. *Held*, it had a right to intervene and the complaint in intervention stated a case.

**Election of remedies by insurance company — finding sustained by evidence.**

2. On learning of the agent's unauthorized act, the insurance company had three courses open: First, it might repudiate his act and demand a return of the policies. Second, it might charge the agent with its share of the premiums, in which event the notes would belong to the agent. Third, it might ratify his act and demand the notes. This, the court found, the company did do. The evidence sustains this finding.

**Form of judgment.**

3. The agent being entitled to 70 per cent of the premium represented by the notes, unless other facts are involved, judgment should be for his assignee for 70 per cent of the amount and for the company for the balance.

**Parties to action — when attorney may act for more than one.**

4. Where there is no substantial controversy between two of the

<sup>1</sup>Reported in 174 N. W. 413.

parties to an action, there is no impropriety in the same attorney representing them so long as the parties represented are content.

Action in the municipal court of Minneapolis upon two promissory notes. The North American Life & Casualty Company filed its complaint in intervention. The facts are stated in the first paragraph of the opinion. The case was tried before Montgomery, J., who when defendant rested denied plaintiff's motion to strike out the intervenor's answers from the files on the ground that no right to intervene had been shown, and upon the further ground that the testimony had not shown the right of intervenor to recover, made findings and ordered judgment in favor of intervenor for \$315.60 and interest. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

*Einar Hoidale, pro se.*

*A. C. Egelston, for respondent.*

HALLAM, J.

1. Intervenor is a life insurance company. In February, 1917, H. W. Maginnis was its agent to solicit insurance. He procured from defendant an application for two policies for \$5,000 each. The first premium on each was \$157.60. Maginnis was entitled to 70 per cent as his commission or compensation. The policies were delivered to Maginnis with instructions to deliver them to defendant only on receipt of the premiums in cash. He disobeyed his instructions and took two notes of defendant, payable to the order of defendant and indorsed by him, one due in 30 days, the other in 60 days. Upon learning that Maginnis had taken the notes, intervenor claims to have demanded them. The insurance for which the notes were given was continued in force. After maturity of the notes Maginnis transferred them to plaintiff. Plaintiff sued on the notes. The insurance company intervened, claiming the notes as its own, and resisting plaintiff's demand for judgment. The court gave judgment for the amount of the notes in its favor, instead of in favor of plaintiff. Plaintiff appealed.



We do not doubt the right of the insurance company to intervene. The notes were indorsed in blank by the payee. The insurance company claimed to own them. Plaintiff also claimed to own them and had possession of them. Under the liberal construction placed upon our intervention statute, G. S. 1913, § 7766, the insurance company had a right to intervene (*Faricy v. St. Paul Inv. & Sav. Society*, 110 Minn. 311, 125 N. W. 676) to defeat plaintiff's recovery and to itself recover on the notes.

Plaintiff contends that the complaint in intervention fails to state a case. We think it, in effect, makes allegation of the facts above recited. It alleges ground for relief against both plaintiff and defendant. That it did not ask judgment against the defendant and that the court gave judgment against the defendant are matters between the intervener and the defendant, with which the plaintiff has no concern.

Coming to the merits of the case:

2. When intervener learned that Maginnis had disobeyed instructions and had delivered the policies and taken the notes, three courses were open to it: First, it might repudiate his act and demand a return of the policies. It did not do this. It chose to have the policies in force. Second, it might charge Maginnis with its proportion of the premiums, in which event the notes would belong to Maginnis. Plaintiff claims that is what intervener did do. Some entries in its books tend to bear out this contention. The oral testimony, however, is to the contrary. The court found against plaintiff on this point and the evidence is such as to sustain the finding. Third, it might ratify Maginnis' unauthorized act in taking the notes and demand delivery of the notes to it. This, the court found, intervener did do. The evidence sustains this finding.

3. The legal title to the notes is doubtless in intervener, and judgment in its favor is sustained. The fact remains, however, that 70 per cent of the proceeds belonged to Maginnis and now apparently belongs to plaintiff as his assignee. Had plaintiff asked that judgment be given in his favor for 70 per cent of the amount and in favor of the intervener for 30 per cent, there is no reason apparent from the record why he should not have had this relief. Practical justice does not seem to

require another lawsuit over this small matter. Plaintiff did not ask this relief. Perhaps he may yet do so. We do not order judgment of this kind, because the case was not submitted on this theory, and there may be matters bearing on the propriety of such a judgment which are not apparent from the record.

4. The fact that the same attorney represented both defendant and intervener does not concern plaintiff. There is no substantial controversy between intervener and defendant and no impropriety in the same attorney representing both so long as both parties represented are content.

Numerous other assignments of error are made. We have examined them carefully. They present no reversible error.

Judgment affirmed.

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STATE EX REL. O. P. FLATEN AND OTHERS v.  
INDEPENDENT SCHOOL DISTRICT OF GRANITE  
FALLS AND OTHERS.<sup>1</sup>

October 10, 1919.

No. 21,436.

**Consolidation of schools — act not special legislation.**

1. Chapter 453, Laws of 1917, relating to the consolidation of schools in any incorporated village or city of the fourth class, which contains two or more school districts, situated wholly or in part within its limits, when only one of such districts maintains a high school, is not unconstitutional as special legislation.

**Constitution — special and general legislation.**

2. A law is general if the class to which it applies requires or justifies legislation peculiar to itself in the matters covered by the law. It is special if the classification is purely arbitrary.

**Same — class legislation.**

3. The power to classify is legislative and the courts will not declare a classification void unless it is manifestly arbitrary.

**Statute not local legislation.**

4. The fact that there is only one city now in the class is not de-

<sup>1</sup>Reported in 174 N. W. 414.

cisive. If the statute is so framed as to apply automatically to other cities as they may acquire the characteristics of the class, then the statute is general.

Upon the relation of O. P. Flaten and others the district court for Chippewa county granted its writ of certiorari to review the proceedings for the consolidation of Independent School District of Granite Falls and School District No. 21 of Chippewa county. The matter was heard before Qvale, J., who made findings and quashed the writ. From the judgment entered pursuant to the order quashing the writ, relators appealed. Affirmed.

*C. A. Fosnes*, for relators.

*Bert O. Loe*, for respondents.

HALLAM, J.

Certiorari to review a proceeding for the consolidation of two school districts in the city of Granite Falls. The proceeding was under chapter 453, p. 757, Laws of 1917. The statute was followed, and if the statute is valid the consolidation proceeding is valid. The contention is that the statute violates section 33, article 4, of the state Constitution which prohibits local or special legislation "regulating the affairs of \* \* \* any \* \* \* school district" and that it is void.

The pertinent language of the statute is:

"When an incorporated village or a city of the fourth class contains two or more school districts of any kind situated wholly or in part within the corporate limits of such village or city, when only one of such districts maintains a state high school, such district may be consolidated and form one district in the manner hereinafter provided."

The particular contentions are that the language of the statute is such that, at present, it can have application only to the city of Granite Falls, and that by its terms it cannot become applicable to any city or village which may hereafter come into the same class.

A law is general if the class to which it applies requires or justifies legislation peculiar to itself in the matters covered by the law. *State v. Cooley*, 56 Minn. 540, 58 N. W. 150. It is special if the classifica-

tion is manifestly arbitrary. The power to classify subjects of legislation is a legislative power, and it is only when the classification is so manifestly arbitrary as to evince legislative purpose of evading the Constitution, that the courts will interfere and declare the legislation special and therefore void. *State v. Westfall*, 85 Minn. 437, 89 N. W. 175, 59 L.R.A. 297, 89 Am. St. 571.

The classification in this case does not seem to us an arbitrary one. There is no apparent impropriety in placing in a class by themselves villages and fourth class cities, having, wholly or in part, within their limits, two or more school districts, one of them a high school.

If it be true that this statute can only apply to the city of Granite Falls, this fact is not decisive of its character. The fact that there is only one city now in the class is no objection to the classification, if it is otherwise proper. *State v. Sullivan*, 72 Minn. 126, 75 N. W. 8; *Marwin v. Board of Auditorium Commrs.* 140 Minn. 346, 168 N. W. 17. If the classification is a proper one and the statute is so framed as to apply automatically to other cities and villages as they may acquire the characteristics of the class, then the statute is general and not special. *State v. Rogers*, 97 Minn. 322, 106 N. W. 345. This statute is plainly of this character. The language "when an incorporated village or a city of the fourth class contains two or more school districts" etc., is of future as well as present application.

The conclusion is that the statute is constitutional and the proceeding under it is valid, and the writ of certiorari was properly quashed.

Judgment affirmed.

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STATE EX REL. OLE GREIBROCK v. ANDREW GRINDELAND,  
JUDGE OF DISTRICT COURT, FOURTEENTH  
JUDICIAL DISTRICT.<sup>1</sup>

October 10, 1919.

No. 21,486.

**Judicial ditch — what landowners may sign petition for ditch.**

1. Under section 5525, G. S. 1913, as amended by chapter 441, Laws 1917,

<sup>1</sup>Reported in 174 N. W. 312.

persons whose lands are described in the petition as affected or benefited by the proposed ditch though not traversed by it, are qualified to sign as petitioners.

Same — jurisdiction of court to establish ditch.

2. The record does not show that relator did not have notice of the preliminary hearing. And, even if he did not, the court had jurisdiction to establish the ditch since no part thereof passes over relator's land.

Upon the relation of Ole Greibrock the supreme court granted its writ of certiorari directed to the district court for Marshall county, Honorable Andrew Grindeland, Judge, to review the action of that court in establishing Judicial Ditch No. 30, Marshall and Pennington counties. Affirmed.

*James Manahan, Thomas V. Sullivan and J. D. Hoogesteger*, for relator.

*Julius J. Olson, Rasmus Hage, Charles Loring and G. A. Youngquist*, for respondent.

HOLT, J.

Certiorari to test the validity of an order establishing a judicial ditch.

Prior to the filing of the petition, County Ditch No. 20 had been constructed in Marshall county. Its course was from east to west, emptying into Thief river. This ditch also received the waters from Judicial Ditches Nos. 12, 13 and 18, which drained portions of westerly parts of Beltrami county and the northerly portion of Pennington lying easterly of the river. The territory mentioned is very flat, sloping slightly to the northwest, the drainage being into Thief river, which here flows in a southwesterly direction. Judicial Ditch No. 18, into which empty also the waters of No. 13, runs for about 11 miles parallel with County Ditch No. 20 of Marshall county, but four miles south thereof, then turns due north into Ditch No. 20. It was found that No. 20 received more waters than it could efficiently discharge, and flooding resulted. To relieve the situation a petition for Judicial Ditch No. 30 was signed, presented to, and granted by the court upon a hearing had on the engineer's preliminary report. The actual ditch, as approved by the court, is an extension due west to Thief river of Judicial Ditch No. 18 from

the point where it turns north as above noted. This extension is about nine miles long. The court found that the entire territory drained by the above named ditches and the one proposed constitutes one drainage basin, and that all lands therein may be affected by the project. There can be no doubt that the record justifies the public need of the ditch petitioned for. Relief must be had from the waters now collected by the existing ditches mentioned, and the evidence justifies the conclusion that the method proposed is the most feasible.

The only question presented by the appeal is whether the petition for the ditch proposed is signed by the proper landowners so as to confer jurisdiction. The petition is signed by 40 persons owning land affected by the flooding in the drainage basin, but only one owns land over which the proposed ditch passes. Prior to the amendment of section 5525, G. S. 1913, by chapter 411, p. 694, Laws 1917, there could be no question but that the petition was signed so as to give jurisdiction, for the signature of but one person whose lands were liable to be affected or assessed for the construction of the ditch sufficed. But, by the amendment referred to, it now requires the petition to be signed "by not less than 25 per cent of the owners of the land described in such petition, but in no event shall more than eight signers be required." Further on in the section it specifies what the petition shall set forth concerning the ditch, among other matters, "a description of the starting point, the general course and the terminus of same, together with a description of the lands over which the proposed ditch or improvement passes."

It is the contention of counsel for relator that no petitioner is legally qualified to sign, unless he be the owner of land through which the proposed ditch is to be constructed, for it is argued that the word "owners" in the first quoted clause is limited by the subsequent one to owners of lands over which the ditch is to pass. We do not think there was any intention by the amendment to change the qualification of the signers of the petition, but merely the number. As introduced and as passed by the House the proposed amendment of the section provided for signature "by not less than 25 per cent of the owners of the land shown by the petition to be affected by the improvement." This was changed

as it passed the Senate to "signed by not less than twenty-five per cent of the owners of the lands described in such petition, as the same appears in the tax duplicates in the office of the county treasurer of the county or counties affected, but in no event to exceed six in number," etc. There were also added further requirements as to what the petition should contain, among others "a description of such lands with the names of the owners." Afterwards the bill went to conference and was amended and passed, so far as this section is concerned, in its present form.

It is to be noted also that the original section 5525, and as left by the amendment of chapter 441, p. 694, Laws 1917, provides that a ditch proceeding may be entertained upon the petition by a township, village or city liable to be affected or assessed for the expense of the construction thereof, or by the duly authorized agent of any public institution, corporation or railroad whose lands are liable to be affected or assessed, or by the state board of control or its duly authorized agent. In none of the three alternatives referred to was there any change from the only condition imposed upon the right of the petitioners to sign, viz., ownership in lands affected by or assessed for the construction of the ditch. It is therefore considered that the phrase "owners of the land described in such petition" means lands so designated therein that it is apparent that the construction of the proposed ditch will affect them or subject them to the expense thereof. Any other interpretation might lead to absurd results. An extensive tract may need drainage badly. There are many owners interested, but the only feasible route for a ditch may be over the lands of a few who oppose drainage. Can it be said this amendment was intended to deprive the many of the opportunity to have the court pass upon the advisability of drainage for the tract? We think not. Other situations readily suggest themselves under which it would be impossible to obtain the advantages the drainage law was intended to confer, if none but the owners of the land through which the drain or ditch is to pass are qualified petitioners.

Another consideration confirms the view that there was no intention to change the status of the signers of a drainage petition. Chapter 441, p. 720, Laws 1917, amended several sections of the drainage law, among them section 5672, relating to the extension of outlets found ineffectual

in drainage projects that have been completed. Such extensions may be secured upon petition of those whose lands were affected by the original proceeding or whose lands are liable to be affected by or assessed for the extension.

Moreover, it is not apparent why, under the petition here attacked, jurisdiction to construct the proposed ditch is not acquired under said section 5672, which confers wide powers upon the court to make equitable assessments upon lands affected for the purpose of constructing a needful outlet for established drainage districts that are subject to flooding. Although the four ditches involved here have been established and constructed in separate proceedings, they are all within one drainage basin and their waters join and are set back by a common ineffectual outlet. A new outlet will benefit the lands in the whole drainage basin. And there is nothing so far taken to deprive the court of power to proceed under said section 5672.

The other objections urged by relator in his brief do not require extended discussion. Assuming that relator owns the land he designates as his in the petition for the writ of certiorari, the record does not show lack of notice of the preliminary hearing as to him so as to deprive the court of jurisdiction to proceed. It is true that we do not discover relator's name among the list attached to the affidavit of the clerk as to mailing the notice. But relator gave no testimony that he had had no notice, or that his address was known to the clerk or could have been ascertained by inquiry at the county treasurer's office. Since the amendment of 1917 eliminated the provisions for notice from section 5525 and inserted one reading differently in section 5526, which says nothing as to the course to pursue if the owner's name or address is unknown to the clerk, we have only the direction contained in section 5557, wherein it is specified that the same notice of the preliminary hearing in a judicial ditch proceeding shall be given as is provided in section 5531, wherein it is provided that the clerk shall mail a printed copy of the notice to all persons whose lands are affected and whose address is known to the clerk or can be ascertained by such clerk by inquiry at the county treasurer's office of the county wherein such land is situated. However that may be, the failure, if such there were, to mail the notice to an individual among



the more than 1,000 interested owners, cannot jeopardize the whole project, or deprive the court of jurisdiction, especially since it does appear that the ditch as now fixed by the court does not touch any land owned by relator. We are not now concerned with the possible damages or benefits to his land. That question has not been reached. If the viewers or the jury determine that his land is not benefited, manifestly no assessment can be levied thereon, and if it be found that only injury results compensation must of course follow.

The petition is signed by qualified parties. It sets forth legal grounds for the proposed project which the evidence amply established. It is not necessary to prove that every tract of land traversed by the ditch will be benefited, or is in need of drainage.

It is to be noted that the order sought to be reversed is a preliminary order and is not the final order establishing the drainage project. The court deemed he had acquired jurisdiction to direct the engineer to make a detailed survey of the whole project as outlined by the petition and the engineer's preliminary report as modified by the court. In this conclusion there was no error.

Order affirmed.

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## MERCHANTS NATIONAL BANK OF DETROIT v. J. B. COYLE.<sup>1</sup>

October 17, 1919.

No. 21,302.

### **Bills and notes — insanity of maker of notes — recovery by payee.**

1. One who loans money to an insane person upon a promissory note without knowledge or notice of his insanity can recover upon it; and in this case the evidence sustains the finding that the plaintiff, loaning money to the defendant on his note, was without knowledge or notice of his insanity.

### **Same — consideration — refusal to submit question to jury.**

2. The evidence was not such as to sustain a finding that the consideration of the note was corporate stock purchased by the defendant of the plaintiff, and the court did not err in refusing to submit such question to the jury.

<sup>1</sup>Reported in 174 N. W. 309.

Action in the district court for Becker county to recover \$2,300 upon a promissory note. The amended answer of defendant's guardian ad litem alleged that, while defendant was insane and known to the officers of plaintiff bank to be insane, they and the promoters of the Gagnon Shoe Company induced defendant to subscribe for certain shares of stock in that company, and to induce him to subscribe the officers of plaintiff bank offered to loan defendant the sum of \$2,300 to pay for the stock, and did so loan him the money in exchange for his note. The case was tried before Roeser, J., who when defendant rested denied plaintiff's motion for a directed verdict in its favor on the ground that defendant had not established a defense to plaintiff's cause of action, and a jury which returned a verdict for the amount demanded. From an order denying his motion for a new trial, defendant appealed. Affirmed.

*Patrick J. Ryan*, for appellant.

*P. F. Schroeder*, for respondent.

DIBELL, J.

Action on a promissory note. There was a verdict for the plaintiff. The defendant appeals from the order denying his motion for a new trial.

1. On December 27, 1916, the defendant borrowed \$2,300 of the plaintiff and gave his promissory note due in one year. The defense is that he was insane at the time and that the plaintiff knew his condition or was charged with notice which would have led to knowledge. He had not been adjudged insane.

The court charged the jury that the defendant, to maintain his defense, must prove two things: "First, that he was at that time insane; and second, that the bank knew that or had knowledge of such facts that it should have known." And it further charged that if the facts recited in the instruction quoted were proved the plaintiff could not recover.

The instruction was correct. The insanity of one party to a contract makes it only voidable, and it cannot be avoided where the other party acted in good faith, and was without notice or knowledge of the insan-

ity, unless restoration can be made and the parties be placed in statu quo. *Schaps v. Lehner*, 54 Minn. 208, 55 N. W. 911; *Youn v. Lamont*, 56 Minn. 216, 57 N. W. 478; *Scott v. Hay*, 90 Minn. 304, 97 N. W. 106. And the burden of proving notice of insanity is upon the one asserting it. *Schaps v. Lehner*, supra.

The general verdict for the plaintiff includes a finding that it was without knowledge, and it is amply sustained by the evidence. The note being given for money loaned, the only way to put the parties in statu quo was for the defendant to pay the note. The plaintiff should therefore recover.

2. We have proceeded upon the assumption that the note was given for money loaned. The defendant claims that the note was given in payment of stock in the Gagnon Shoe Company purchased of the bank at the time and that he should be relieved of payment upon returning the stock. The court refused to submit the question whether the note was given for the stock. In this it was right. The defendant got 23 shares of the Gagnon stock on the day he borrowed the \$2,300. Just how he got it is not clear. It is clear that he did not buy it of the bank and that the note was not given in purchase of it. A finding that he purchased the stock from the bank would not be permitted to stand. A recital of the evidence upon this point would serve no good purpose.

There was no error in the trial.

Order affirmed.

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JOHN OTTERSTETTER AND ANOTHER v. STEENERSON  
BROS. LUMBER COMPANY.<sup>1</sup>

October 17, 1919.

No. 21,320.

**Exchange of property — deceit — measure of damages.**

1. In action for damages for deceit in a transaction for the exchange of real property, the general rule of damages is the difference in value of what the plaintiffs were induced to part with and the value of what they received.

<sup>1</sup>Reported in 174 N. W. 305.

**Same.**

2. The plaintiffs are entitled to recover, under the proofs and findings of the trial court, the difference between the value of the real estate parted with, plus the amount of the mortgage assumed and the mortgage given by them, and the value of the land which they received in the transaction.

**Fraud — value — findings supported by evidence.**

3. Testimony considered and *held* sufficient to justify the findings as to fraud and the value of the properties in question.

**Pleading and proof — admission of evidence.**

4. There was no error in admitting proof of the amount of expense plaintiffs were put to in moving to and from the farm, under the pleadings. Nor was the same prejudicial, the court holding adversely to plaintiffs' contention as to a rescission.

Action in the district court for Clay county to recover \$2,500 for fraudulent representations in the exchange of certain real property. The facts are stated in the opinion. The case was tried before Roeser, J., who made findings that plaintiffs were entitled to recover \$3,100, on the conditions mentioned in the first paragraph of the opinion. Defendant's motions for amended findings and for a new trial were denied. From the order denying its motion for a new trial, defendant appealed. Affirmed.

*Christian G. Dosland*, for appellant.

*F. H. Peterson*, for respondents.

QUINN, J.

This is an appeal from an order of the district court of the county of Clay denying the defendant's motion for a new trial. The alleged cause of action arose out of an exchange of real estate, the claim of the plaintiffs being that they were deceived and defrauded in the transaction by the false and fraudulent representations of the defendant and its representatives as to the quality, condition and value of its land given in exchange for the homestead of plaintiffs situated in the city of Moorhead. The cause was tried to the court sitting without a jury. Findings and an order for judgment were made in favor of the plaintiffs for damages in the sum of \$3,100, providing that \$1,200 of this amount

might be canceled, by filing with the clerk of the court the note and mortgage of plaintiffs for that amount, together with a satisfaction of the same, duly recorded within 30 days, and if that was not done plaintiffs might entered judgment for the full sum of \$3,100 with interest and costs.

The assignments of error are many, and there is a sharp conflict in the testimony bearing upon the issues in the case. The trial court held that plaintiffs were not entitled to a rescission, but might recover damages on account of the alleged fraud. It is not disputed that if the plaintiffs are entitled to recover at all, they are entitled to recover the difference in value of what they were induced to part with and the value of what they received in the transaction, under the rule announced in *Ritko v. Grove*, 102 Minn. 312, 113 N. W. 629.

It is alleged in the complaint, in effect, that at the time in question the defendant sold to the plaintiffs the northeast quarter of section 24, township 138 north, range 36 west, for the sum of \$4,000, and that plaintiffs paid for the same by executing to defendant a deed to their home, situated in the city of Moorhead, valued at \$2,000, by assuming a first mortgage upon said farm for \$750, and by executing to the defendant their promissory note for \$1,250, secured by a second mortgage upon said premises; that in order to induce the plaintiffs to purchase said lands defendant represented to plaintiffs that all of said farm lands were tillable and capable of being broken and planted to crops; that the soil was black sandy loam with clay subsoil and would produce good crops of wheat, rye, corn, potatoes and similar crops; that it had only a few stones in it; that there were 40 acres under cultivation, and that the same was worth more than \$25 per acre. That said representations were false and known to be false by defendant at the time they were made, and that the same were made for the purpose of deceiving and defrauding plaintiffs. That in truth and fact said lands were very poor with a thin sandy soil and sand subsoil, and were stony and rocky; that they could not be plowed or cultivated with success; that only ten acres thereof were actually broken up so that same could be plowed; that said lands would not raise good crops or any crops whatever, except under the most favorable conditions and best of seasons; that said

lands were not worth \$25 an acre nor any greater amount than \$10 per acre; that plaintiffs believed said representations and relied upon the same and purchased said lands and paid therefor as above specified; that defendant knew that plaintiffs were purchasing said lands for the purpose of making their home on the same; that plaintiffs removed from their home in the city of Moorhead and went upon said farm and attempted to farm the same, but were unable to raise any crops thereon and were obliged to remove therefrom; that plaintiffs were put to large expense in moving to said farm and removing therefrom, and that such expense amounted in the aggregate to \$500; that plaintiffs have elected to rescind said contract and do hereby rescind the same and bring this action to recover for the defendant's fraud and deceit, and that plaintiffs have suffered damages in the sum of \$2,500, for which amount they demand judgment.

The answer put in issue the value of both pieces of real property, the question of fraud and deceit, and alleged that the plaintiffs had a full opportunity to and did inspect the farm before the deal was consummated.

While the trial court in its findings and order for judgment refers to the amount at which the farm was figured in the transaction as being \$3,950, and the note and mortgage given by plaintiffs as \$1,200, yet it conclusively appears from the record and from the statements of counsel that the amount at which the land was figured was \$3,920, and the note and mortgage \$1,170, the slight discrepancy resulting undoubtedly from the fact that the price of the land first agreed upon was \$4,000, and upon an examination of the buildings a reduction of \$50 on account of their condition was agreed upon. In reducing the agreement to writing a reduction of 50 cents per acre, or \$80, was made instead of \$50, thereby fixing the price of the land at \$3,920, the amount of the note and mortgage being correspondingly lowered.

The findings as made by the trial court upon the question of fraud and the value of the farm lands are, we think, justified by the evidence, and while the proof is somewhat unsatisfactory as to the value of the Moorhead property, it is sufficient to justify the conclusion at which the trial court arrived. The court found specifically that the considera-

tion with which the plaintiffs parted in payment for the farm consisted of three items, namely: House and lot, \$2,000; assumption of mortgage on farm, \$750; note and mortgage of plaintiffs, \$1,170, making a total of \$3,920, from which the court deducted \$850 as the value of the land received by plaintiffs less the encumbrance of \$750, leaving the difference between what plaintiffs received and what they parted with at \$3,070, for which amount it held that the plaintiffs were entitled to judgment, providing that \$1,170 of this amount might be canceled by a satisfaction of the note and mortgage.

It will be observed that, in arriving at the amount which the plaintiffs parted with, the court gave them credit for \$750 on account of assuming the mortgage on the farm. The assumption of this mortgage was treated as though it had been a cash payment. If it had been paid in cash it would have satisfied the mortgage, in which event the value of the land, \$1,600 instead of \$850, should have been deducted from the amount which the plaintiffs parted with, leaving a difference of \$2,320 for which plaintiffs are entitled to judgment. Then by deducting \$1,170 therefrom in case the note and mortgage with a satisfaction thereof were filed with the clerk, there would be left a balance of \$1,150, for which plaintiffs are entitled to judgment. In other words, while the findings of fact as made by the trial court are correct in the abstract, yet, in arriving at a conclusion as to the amount which plaintiffs are entitled to recover, the amount of the value of the farm should have been deducted from what plaintiffs parted with. Plaintiffs still retain the farm, and, if they pay the item of \$750 for which they were given credit, the mortgage will be satisfied and the farm left clear.

With reference to assignments of error numbers 1, 2, 3, 8<sup>1</sup>, and 9<sup>2</sup>, we think they are not well taken. At the close of plaintiffs' case they asked leave to amend the complaint to correspond with the proofs as to the amount of damages. The court granted the application. Nor is there any merit in the contention that the court erred in receiving evidence as to the expense to which plaintiffs were put in moving to and from the farm. In the complaint a rescission was asked for. Upon

<sup>1</sup>[As to specific findings of fact.]    <sup>2</sup>[As to the conclusion of law.]

that theory the evidence was admissible, but the court found adversely to plaintiffs thereon and the testimony was harmless. Upon the whole record as we view it justice will be best served by amending the order for judgment instead of incurring the expense of a new trial.

Remanded with directions to the trial court to modify the order for judgment as herein indicated, and as so modified the order appealed from is affirmed.

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FLOYD KEYSER AND ANOTHER v. EMIL HAGE AND OTHERS.  
STATE BANK OF SLEEPY EYE AND OTHERS,  
RESPONDENTS.<sup>1</sup>

October 17, 1919.

No. 21,363.

**Partition — when evidence justifies a sale.**

The statute prefers a partition of lands in kind to a sale of them and a division of the proceeds. A sale may be had when partition cannot be had without great prejudice to the owners. The evidence in this case tended to show difficulty in dividing the land sought to be partitioned into portions of equal value. There was an encumbrance covering the whole. The evidence sustains a finding that a partition could not be had without great prejudice and justifies a sale.

Action in the district court for Brown county for the partition of certain real property, and for a sale thereof in case partition could not be made without great prejudice to the owners. The case was tried before Clague, J., who made findings and ordered that the land be sold. From the judgment entered pursuant to the order for judgment, Emil G. Hage and Dora M. Hage appealed. Affirmed.

*Somsen, Dempsey & Flor*, for appellants.

*Olsen & Mueller*, for respondents.

DIBELL, J.

This is an action for partition. The court found that the lands were

<sup>1</sup>Reported in 174 N. W. 311.



so situated that partition thereof could not be had without great prejudice to the owners and that a sale should be had, and adjudged accordingly. The defendants Emil G. Hage and his wife appeal.

The question is whether the partition should be in kind or by sale. Many years ago the plaintiff Floyd Keyser and the defendant Emil G. Hage purchased the land involved on contract and they are the equitable owners of it. There becomes due on December 1, 1919, \$19,000 of the unpaid purchase price, with one year's interest. The property is worth \$47,000. It consists of a farm of 397 acres. Three hundred seventy acres are in one body and 27 acres are something like a mile away. Upon the 370 acres are improvements in the way of buildings worth from \$7,000 to \$9,000. The lands have been operated as one farm. The buildings are in value and in size out of proportion to the portion which would be set off to either cotenant if there were partition in kind. The \$19,000 owing to the vendors cannot be apportioned, a part upon a tract set off to the plaintiff, and a part upon a tract set off to the defendant. If there should be a partition in specie the vendors could enforce their rights without reference to the partition of the interests of the plaintiff and the defendant.

The statute favors partition in kind rather than upon sale. G. S. 1913, §§ 8028, 8041; *Hoerr v. Hoerr*, 140 Minn. 223, 165 N. W. 472, 167 N. W. 735. It discourages owelty to equalize partition. *Hoerr v. Hoerr*. Taking into consideration the difficulty of making an equal division without overloading one tract with too extensive improvements, the disinclination to decree owelty to make partition equal, and the existence of the \$19,000 encumbrance soon due, which cannot be divided and put one part on one tract and the rest on the other, or put wholly on one, we think the trial court's finding is sustained.

**Affirmed.**

IN THE MATTER OF THE ASSESSMENT OF BENEFITS ARISING FROM PAVING, ETC., ON MOUND BOULEVARD.

CITY OF ST. PAUL v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.<sup>1</sup>

October 17, 1919.

No. 21,378.

**Confirmation of local assessment — levy under mistake of fact or erroneous principle — evidence admissible.**

1. Upon a hearing before the court upon application by the city of St. Paul for judgment confirming an assessment made for local improvement under section 247 of the city charter, testimony is admissible to prove that the assessment was not made under a mistake of fact or upon erroneous principles of law.

**Same — exemption of part of lot.**

2. If on such application it appears that part of a lot or parcel against which an assessment is sought is exempt from assessment, the judgment should eliminate that part from the assessment roll.

In the above entitled matter the city of St. Paul made application to the district court for Ramsey county for confirmation of the assessment of benefits, costs and expenses. Defendant railroad company filed an answer and alleged that it was a railroad company and paid a percentage tax upon its gross earnings in the state of Minnesota, that the parcels of land assessed were used and owned for railway purposes, and the city of St. Paul had not power to levy any assessment for such improvements upon them; that in levying the same the council did not make it upon the basis and in accordance with the benefits, but levied the same arbitrarily, and the property described derived no benefit whatsoever from the improvement. The matter was heard before Haupt, J., who made findings as stated in the second paragraph of the opinion, and ordered judgment in favor of the city. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

<sup>1</sup>Reported in 174 N. W. 310.

*Barrows, Stewart & Metcalf*, for appellant.

*O. H. O'Neill and John A. Burns*, for respondent.

HOLT, J.

In the city of St. Paul on Dayton's bluff runs a street named Mounds Boulevard. Its course is nearly parallel to the river. The distance between the street and the river is approximately 300 feet where the appellant owns certain platted lots. This appeal arises in a proceeding to assess these lots for benefits on account of the construction of curbing, paving, ornamental lamp standards, etc., on Mounds Boulevard. The railway company appeared in court and objected to the entry of judgment confirming the assessment made against the lots on the ground that the land was exempt; that the assessment was levied arbitrarily; that it was made under a demonstrable mistake of fact and upon an illegal and erroneous principle of law.

The assessment roll or list as filed assessed the benefits against each lot as a whole, and did not in terms confine them to the portion between the street and the brow of the bluff. Upon the hearing had, the court found that the assessment was made in accordance with law; that "the objector, the Chicago, Burlington & Quincy Railroad, is, and for more than thirty years has been, a corporation common carrier, owning and operating lines of railroad within and without the state of Minnesota, and as such corporation pays annually to the treasurer of this state the legal percentage of its gross earnings in lieu of other taxation. Objector's railroad lines entering said city of St. Paul traverse the east shore line of the Mississippi river and are located adjacent to the bluff along said river, which bluff has a perpendicular elevation of 112 to 114 feet. The superficial soil deposits of said bluff average 8 to 10 feet in depth, immediately below which is a stratum of limestone rock of practically the same thickness, while underlying the limestone formation is sandstone rock. The face of the bluff is constituted of sand and lime rock formation and is practically perpendicular. The top of said bluff is level and well adapted for gardening and building purposes;" further that the railway company during the period named owned the lots in question, describing them, and that "each and all of said parcels of land

lie to the south of and abut on said Mounds Park Boulevard, and extend from the south line of said boulevard across the top of said bluff and thence to the river's edge, ranging in depth from 280 to 340 feet. That portions of said pieces or parcels of land lying between the base line of said bluff and the water's edge are occupied, used and owned, and for two years last past have been so occupied, used and appropriated for railroad purposes by the said objector. That the portions of said parcels of land lying on the summit of said bluff have a variance in depth or length between the south side of said boulevard and the top line of said bluff [of] from 100 to 190 feet. In estimating the benefits and advantages arising from said improvements to abutting property subject thereto, said city took into consideration so much only of said pieces or parcels of land as lie upon the top of said bluff. That the respective amount assessed against each piece or parcel of land in said assessment and herein described was fairly, justly and equitably distributed thereon in manner and form as provided by the charter of said city. As to that portion of said pieces or parcels of land which lies upon the top of said bluff and abuts upon said Mounds Park Boulevard, and as to which said assessment was levied, it is not now and has not been used or in any wise appropriated for railroad purposes \* \* \* of objector's railroad."

The court directed judgment against each of the lots described in the assessment roll for the amount set opposite the same. Judgment was so entered, and the company appeals.

There can be no doubt that under the findings the portion of the lots situated between the street named and the brow of the bluff was subject to assessment for the improvements made, and that the whole amount levied was a just and proper amount on such portion. It is equally clear from the facts found, that the part of each lot lying between the brow of the bluff and the river is exempt and no part of the assessment can be levied thereon.

The appeal questions but one finding of fact, and incidental thereto assigns error in the reception of the evidence upon which that finding is predicated. The point is also made that the findings of fact do not justify the judgment.

The finding assailed is the one wherein the court finds that in estimating the benefits and advantages to the abutting property the city took into consideration so much only of the lots as lie on top of the bluff. The finding is amply sustained by the uncontradicted testimony of Mr. Seamer, and the only question is whether his testimony was competent or admissible. He was the chief clerk of the bureau of assessments, the department charged with the duty of ascertaining and spreading assessments for improvements. He personally examined the ground to obtain the data for the assessment, and it is evident from an inspection of the assessment roll and the plat, showing where the edge of the bluff crosses the several lots, that the assessment differed as the area of the lots on the top of the bluff varied.

The objection urged was that the testimony was incompetent and not the best evidence. The objection was not well taken. The hearing before the court is a step in the assessment proceeding in which the owner may show that the assessment is fraudulent or is made upon a demonstrable mistake of fact or upon an illegal or erroneous principle of law. Section 247, St. Paul City Charter. If the owner may so show, it would follow that the city should also be permitted to prove that there was no mistake of fact and that legal and correct principles of law were applied. The section cited also provided: "At such hearing the court may modify, alter, amend, revise the whole or any part of such assessment, or strike out any parcel of land therefrom upon the ground that no benefits inured thereto, or it may direct the commissioner of finance so to do in accordance with the terms of its order, and thereafter without notice submit the same to the court for its approval." It is clear that under this provision of the charter the court may, upon the hearing for judgment of confirmation, inquire into and determine whether the whole or any part of the lot or parcel of land specified in the assessment roll is to be assessed and the amount of such assessment. This would justify the admission of Seamer's testimony.

The claim is made that on the findings the court could give judgment only for appellant under the decision of *State v. Chicago*, R. I. & P. Ry. Co. 141 Minn. 472, 170 N. W. 613. We think not. That was a case where an assessment for a county ditch had been levied and was

sought to be enforced in a regular real estate tax proceeding. Therein the court is not given any power to make or modify a drainage assessment. The assessment had been made by the county board upon exempt and unexempt land as a unit. It is clear that the case is not similiar to the one at bar either upon the law or the facts.

The railroad company now insists that the judgment ordered is wrong in that it is not limited to the parts of the lots on top of the bluff. The city, while conceding the land lying between the edge of the bluff and the river to be exempt, nevertheless claims the judgment to be in the proper form, and that section 264 of the charter prescribes the method of delimiting the portion of the lots which is immune to assessment. The section referred to seems designed to apply to cases of errors in description discovered after the entry of the judgment of confirmation, or to cases where there has been an alteration or division of the parcel assessed. We do not think it was intended to apply to a situation like the present where the evidence and the findings of fact clearly indicate that a certain definite part of the lot or parcel of land described in the assessment roll is not subject to assessment. Where this appears the judgment ordered should be confined to the land legally liable.

However, the case was not tried by appellant in the court below on the theory that a portion of the lots could be assessed, but that the whole of each was exempt as being used and devoted to railroad purposes. Nor did its motion for amended findings request or suggest a modification of the order for judgment so as to embrace only the portion of the lots on top of the bluff. There was no motion for a new trial. Under that situation our conclusion is that the judgment should be affirmed, but without prejudice to the right of the railroad company to apply to the court below for a modification of the judgment in conformity with this opinion.

Judgment affirmed.

## WILLIAM M. WILLIAMS v. L. E. THOMSON.

October 17, 1919.

No. 21,451.

**Contract in restraint of trade — breach — evidence.**

In an action to recover damages for breach of a contract which the parties had entered into, and to restrain the defendant from engaging in the garage business within Blue Earth county for the period of 10 years, *held*, that the contract was not void as being in restraint of trade.

Action in the district court for Blue Earth county to recover \$2,000 for breach of contract. The facts are stated in the opinion. The case was tried before Comstock, J., who when defendant rested granted his motion for a directed verdict. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, plaintiff appealed. Reversed.

*C. J. Laurisch and Carl Strom*, for appellant.

*George W. Champlin and C. E. Phillips*, for respondent.

QUINN, J.

Action to recover damages for breach of contract and to restrain defendant from engaging in the garage business in the city of Lake Crystal. The court directed a verdict in favor of defendant. Plaintiff moved for a new trial. The motion was denied and this is an appeal from the order.

During the spring of 1915, plaintiff and defendant entered into a contract in writing, whereby defendant sold to plaintiff his garage and automobile business and all machinery, tools and stock in connection therewith, in the Whiting building in the city of Lake Crystal, Blue Earth county, together with the good will and benefits of said business. The contract contained the further provision: "Party of first part agrees not to directly or indirectly engage in the automobile or garage business in said county of Blue Earth all for the period of ten years without the written consent of the party of the second part, except that after the period of two years first party may locate at Mankato, Minn., if he so desires. Party of the second part gives party of first part

<sup>1</sup>Reported in 174 N. W. 307.

<sup>2</sup>[Defendant in this action.]

privilege of selling automobiles only, and it is mutually agreed that party of first part is to do no repairing or garage work on any car or automobile he may sell."

The answer, so far as here material, admits the making of the contract and that for a short time during the period in question defendant was engaged as a mechanic in the garage of one Harris in the city of Lake Crystal. Upon the trial defendant was called for cross-examination, and testified, in effect, that he was an experienced automobile mechanic, and that he had been engaged in the automobile business prior to the date of the contract here in question for seven or eight years, running a repair shop and automobile business at Lake Crystal. The plaintiff then offered in evidence the contract in question, which was objected to as incompetent, irrelevant and immaterial and as being void on its face under the laws of this state. The objection was sustained. Plaintiff then offered to show that at the time in question the defendant was in the employ of one Harris in an automobile garage within the city of Lake Crystal as foreman thereof, in violation of the terms of the contract. The same was objected to as incompetent and irrelevant and the objection was sustained.

Blue Earth county contains practically 21 congressional townships, being about four townships north and south by five east and west. The city of Lake Crystal is situated about seven miles east of the west line and about the same distance south of the north line of the county. There are some 11 or 12 villages and cities in the county where garages or automobile shops are likely to be maintained, which fact may be considered in determining the validity of the contract in question.

It is quite clear from the record that the trial court considered the contract void as being in restraint of trade, and upon that ground sustained the objections. It has been repeatedly held in this state "that there is no hard and fast rule as to what contracts are void as being in restraint of trade, but each case must be judged according to its own facts and circumstances; that a party may legally purchase the business and trade of another for the very purpose of removing or preventing competition, coupled with an undertaking on the part of the seller not to carry on the same business in the same place or within the same territory; and the question of the reasonableness of the restraint of trade de-



pend upon whether it is such only as to afford a fair protection to the party in whose favor it is made; and the limits of restraint as to space depend upon the kind of trade or business which is the subject or the contract." *National Benefit Co. v. Union Hospital Co.* 45 Minn. 272, 47 N. W. 806, 11 L. R. A. 437; *Kronsnabel-Smith Co. v. Kronsnabel*, 87 Minn. 230, 91 N. W. 892; *Berghuis v. Schultz*, 119 Minn. 87, 137 N. W. 201.

We see no legal objection to the contract. Its effect was a sale by defendant of his garage business and good will, with a stipulation on his part to refrain from engaging either directly or indirectly in the business within the county for the period of ten years, except that he retained the right to sell automobiles and to locate, in the garage business, at Mankato after two years. It will be seen that the restriction is limited both as to time and territory. It does not prevent the defendant from pursuing such business at any place except within the county. The defendant was a skilled automobile mechanic, he had conducted a garage and automobile repair business at Lake Crystal for seven or eight years, and had entered into a contract with plaintiff whereby he covenanted not to engage in such business within the county during the time stated. The plaintiff had paid him a sum greatly in excess, it is claimed, of the value of the tools, machinery and stock transferred. The present facility for traveling from one portion of a county to another naturally enlarges the territory from which a business such as the one in question might draw trade. Nor are we able to say that the defendant's engaging in the business, especially within the village of Lake Crystal, which he had contracted not to do, might not materially interfere with plaintiff's work.

The test is: "Where the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between the parties, and not specially injurious to the public, the restraint is reasonable and valid." 22 Am. Law Rev. 887; *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37; *Western Union Tel. Co. v. Burlington & S. W. Ry. Co.* 11 Fed. 1; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E.

419, 60 Am. Rep. 464; Kronschnabel-Smith Co. v. Kronschnabel, *supra*.  
The order appealed from is reversed and new trial granted.

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STATE v. HOBART IRON COMPANY.<sup>1</sup>

No. 21,231.

June 13, 1919.

**Mine and mineral — state lease — royalty on crude "wash" ores.**

By the state mining lease lands are leased "for the purposes of exploring for, mining, taking out and removing therefrom, the merchantable shipping iron ore." The lessee agrees to pay the state "for all the iron ore mined and removed \* \* \* at the rate of twenty-five (25) cents per ton." In defendant's mine operated under a state lease is a body of low grade ore which cannot be used in the furnaces under present furnace methods. It can be mined and washed in a washing plant constructed upon the leased premises and the concentrates be shipped to the furnaces and sold and a profit result after paying the mining, washing and transportation charges and the royalty. No profit will result if the mined ore is shipped to the furnaces, and washed there, the cost of transportation being such as to prevent.

*Held*, that the mined iron ore before washing is the ore referred to in the lease and upon it the lessee must pay the royalty of twenty-five cents per ton and not upon the lesser tonnage of concentrates.

March 5, 1920.

**State mining lease — cases followed.**

1. The state mining lease is a lease in fact and not a sale of ore in place, following former decisions.

**Same — due process of law.**

2. The holding that a lessee under a state mining lease, taking low grade ore from the mine in the manner of ordinary good mining, must pay on the tonnage of the product, although under present furnace methods it is not directly usable in the furnaces, and not on the reduced tonnage of concentrates resulting from such product after it is taken to the washer and there treated or "beneficiated," does not offend the contract or due process provisions of the Federal Constitution.

<sup>1</sup>Reported in 172 N. W. 299, 175 N. W. 100.

Action in the district court for St. Louis county to recover a balance of \$1,401.75, royalty due under a state mining lease.

The answer alleged that plaintiff had been paid in full for all the iron ore defendant had taken out, mined and carried away from the Majorca mine up to July 1, 1918; that all the iron ore taken by defendant was weighed by the railroad company and the total weight thereof was 28,421 tons. It further alleged that the merchantable shipping iron ore is to a considerable extent mixed with sand and silica, dirt, rock and useless materials; that by means of a "washing plant" the iron ore and other materials were separated by washing and the useless materials other than iron ore were deposited and left on the premises and the process was carried on in the usual manner on the Missabe range; that no more of such materials was separated in such process than was necessary and no merchantable iron ore was wasted; that in such process defendant separated and deposited and left on the property 5,067 tons of such sand, silica, dirt, small rocks and other useless material from 10,414 tons of the merchantable iron ore which it handled through such washing plant, and alleged that it was on account of this material that plaintiff sought to recover on the theory that defendant is required to pay for the total weight of material lifted from the mine to the washing plant and before materials other than iron ore have been separated therefrom. A demurrer to the answer on the ground that it did not state facts sufficient to constitute a defense, was overruled.

The case was tried upon an agreed statement of facts before Dancar, J., who made findings and ordered judgment in favor of defendant. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Reversed.

*Clifford L. Hilton*, Attorney General, and *Egbert S. Oakley*, Assistant Attorney General, for appellant.

*Washburn, Bailey & Mitchell*, for respondent.

*Hoyt, Dustin, McKeehan & Andrews, Horace Andrews, William P. Belden* and *John B. Putnam*, filed a brief on reargument as amici curiae.

*Leon E. Lum* filed a brief on reargument as amicus curiae.

DIBELL, J.

This is an action by the state to recover royalties upon a mining lease. There was judgment for the defendant and the state appeals.

The defendant operates the Majorca mine under a lease from the state. The lease was granted to its assignors in 1902, and is in the statutory form. Laws 1895, p. 227, c. 105, § 4; G. S. 1913, § 5315. It recites that the premises are leased "for the purposes of exploring for, mining, taking out and removing therefrom, the merchantable shipping iron ore, which is or which hereafter may be found," etc. The lessee agrees to pay "for all the iron ore mined and removed \* \* \* at the rate of twenty-five (25) cents per ton, for all iron ore so taken out, mined and carried away." It is provided that the "iron ore so taken \* \* \* shall be weighed by the railroad company transporting the same from said land; which weight shall determine the quantity as between the parties hereto." There is reserved the right to inspect and test the scales and weights, and errors are subject to correction. The lessee is required to "open, use and work the said mines in such manner only as is usual and customary in the skilful and proper mining operations of similar character," etc. There is a minimum output provision.

The general question is whether a lessee under such a lease who mines and treats so-called "wash" ores must pay royalty on the crude ore or the concentrates, and the precise question presented for decision is whether when such lessee takes from its natural bed low grade iron ore, not directly usable in the furnaces under present furnace methods, and subjects it to a washing process in a washing plant constructed upon the leased premises, from which concentrates result which are usable in the furnaces and which have such value that the ore may be mined and washed and the concentrates transported to the furnaces and sold at a profit after paying 25 cents per ton royalty on the crude ore, although because of transportation charges the crude ore could not be shipped to the furnace and washed there and sold at a profit, must pay royalty on the ore before washing or on the concentrates.

This question is presented on this concrete state of facts: The defendant has in a portion of the Majorca mine an estimated body of 1,500,000 tons of iron ore whereof 350,000 tons have an average

of 55.58 per cent metallic iron, designated by the parties standard ore, and 1,150,000 tons have an average of 45 per cent of metallic iron, designated by the parties low grade ore. In April, May and June, 1918, it removed from its place in its natural bed, in addition to certain standard ore, 16,021 tons of low grade ore, submitted it to a washing process in a washing plant constructed on the premises, and as a result obtained 10,414 tons and 140 pounds of concentrates. The remaining 5,607 tons was waste and was left on the premises. The decrease in tonnage through the washing process was substantially one-third. The 16,021 tons was not directly usable in the furnaces under present furnace methods. Neither, if there was a washing plant at the furnaces, could it have been mined and shipped to the furnaces and washed there and a profit obtained upon the sale of the concentrates, the cost of transportation being such as to prevent a profit. The 10,114 tons of concentrates was directly usable in the furnaces, could be shipped from the washing plant to the furnaces and sold at a profit after paying all mining, washing and transportation charges and the state royalty of 25 cents, whether such royalty was based on the 16,021 tons subjected to the washing process, or the 10,414 tons of concentrates resulting.

These are the essential facts stated briefly. They are stated concisely and in greater detail in the findings and a quotation at length of a portion of them will conduce to a completer understanding:

"f. That during the months of April, May and June, 1918, the defendant mined and removed from said property 18,007 tons and 300 pounds of said standard ore, which was shipped and weighed without washing, and from which such dirt and rock, and other useless material as it was practical to separate by hand, or with a shovel, had been so separated and left on the property in the ordinary, customary and usual way that the mining of such ore is carried on upon the Mesaba Range; and during said months removed from its natural bed on such premises 16,021 tons and 140 pounds of such low grade ore, and carried by tram cars the same to and treated the same in said washing plant, and that by said washing process defendant produced from the low grade ore so washed 10,414 tons and 140 pounds of concentrates, which it shipped from said property and which as so shipped was merchantable shipping iron ore. That said weights were determined by the railroad company

transporting the same from said property and as the fact is. That 5,607 tons of sand, silica, dirt and other useless material were removed from such low grade ore by the washing thereof and were deposited by the defendant in a sludge pond situate along the northern line of and upon said S.½ of S.E.¼ of said section 9 and left upon said property. That such washing process was carried on in the usual, customary and generally approved manner on the Mesaba Range, and no more of such waste and useless material other than iron ore was separated from said iron ore than was necessary to separate said iron ore, and no iron ore was wasted in such process and that the said concentrates contained no greater percentage of iron ore than necessary to make the same merchantable.

"g. That said standard ore as mined was suitable for furnace use without further treatment. That said low grade ore removed from its natural bed as aforesaid was not adapted to furnace use under present known methods. That said low grade ore on account of transportation charges could not have been conveyed to furnaces, there treated by such washing process, and the concentrates obtained therefrom and thereat sold at a profit; that is to say, the value of such concentrates, obtained by such washing process at furnace points, was less than a sum equal to twenty-five cents (25c) per ton on such low grade ore, the cost of mining, transporting and washing the same and marketing said concentrates.

"h. That the low grade ore so mined by defendant during April, May and June, 1918, and thereafter subjected to treatment in said washing plant was mined, washed and marketed at a profit in this way; that is to say, the said 16,021 tons and 140 pounds of low grade ore so treated in such washing plant produced concentrates in the following amounts, to-wit: 10,414 tons and 140 pounds, which concentrates were of a market value greater than the sum equal to twenty-five cents (25c) a ton on said 16,021 tons and 140 pounds of low grade ore and (plus) the cost of mining and washing said low grade ore and transporting and marketing said concentrates."

The trial court held that the royalty wa. payable on the concentrates, and not upon the crude ore as it came from the mine. The defendant had paid on the basis of the concentrates and judgment was therefore

in its favor. We have reached the conclusion that royalty was payable on the crude ore.

The tendency is constant for low grade iron ore to come into the class designated as merchantable shipping iron ore. Improved furnace methods and improved methods of treatment make iron ore usable which before such methods was not usable. More efficient mining methods and better transportation conditions make it profitable to mine and ship ore which, though usable, could not be mined and shipped at a profit if less efficient methods in mining and transportation were used. Gradually lower grade ores become capable of use and are mined and marketed at a profit.

The low grade ore, just as the standard ore, is iron ore. It has an iron content distributed through it with considerable uniformity which gives it value notwithstanding the presence of the silica and sand and other waste substances with which it is intermixed. Its value is not prospective only. It has a value, or some of it has, for present use. It differs from the standard ore in quality and value, and it differs in this respect, important in this litigation, that it cannot be used in the furnaces under present known furnace methods in the condition in which it comes from its natural bed in the mine after the removal from it of such dirt and rock and other waste material as it is practical and customary to remove by hand or pick or shovel or otherwise in ordinary good mining. Indeed this particular difference makes this litigation: for, if the ore as it comes from the mine were usable in the furnaces without washing, the defendant would not claim that the royalty should be based on concentrates. If the usability in the furnaces of the ore as it comes from the mine in the usual course of good mining is the test whether it is "merchantable shipping iron ore" upon which as "iron ore mined and removed" the payment of royalty is promised, then, other considerations aside, royalty upon the crude ore could not be exacted, and the concentrates of such crude ore, if any, as the lessee had under his lease the right to take and treat, would then seem to furnish a proper basis for computing royalty.

This body of 16,021 tons of low grade ore as it lay in its natural bed

was worth the taking away. There was profit in it. The lessee could pay the 25 cents royalty and the mining, washing and carrying charges and upon sale have a margin. That is why it took it. Within the meaning of the lease, so far as concerns the provision for the payment of royalty, whatever it may be elsewhere, the washing process is not mining and the concentrates the result of mining so that there is no mined ore, or merchantable ore, until concentration. The standard and other grades of ore can be washed and the relative iron content increased. A washing plant represents a considerable investment. Its construction requires a proper physical location and the presence of proper water conditions. The washing process is a treatment of the ore. The crude ore has been won from the earth and the washing treatment refines and betters it by a mechanical process. Mining men call it the "beneficiation" of the ore. By it the iron content per ton is increased. What is mined is the low grade ore. That is what the lessee takes under the lease. It comes within the statutory term of the lease, "iron ore mined and removed," and it is iron ore for which the lessee undertakes to pay a royalty of 25 cents per ton. Within the contemplation of the lease the iron ore taken to the washing plant is the iron ore mined, and within its contemplation this is the iron ore upon which the royalty of 25 cents per ton is to be paid. The lessee claims to take it as iron ore. There is no reservation and its right is not disputed. Fortunately for the lessee the application of the washing treatment makes, just as the discovery and application of some other treatment or of an improved furnace method might make, the low grade ore profitably usable, so that it can be mined and washed and marketed at a profit; otherwise it would not take it. The state shares in the gain coming from the treatment, just as it gains from an improvement in furnace methods and transportation and mining, in this respect and to this extent, that when the call comes for its low grade ore and it is mined under a lease it gets a 25 cents royalty, but it never gets more. The lessee gets the profit, large or small, beyond this.

The defendant calls attention to the provision of the lease making the weights of the railroad transporting the ore from the mine controlling



between the parties, and it urges that since the only ore which it transports by railroad is the concentrates the weight of the concentrates fixes the basis for the computation of royalty. If the state is entitled to royalty upon the crude ore before it goes to the washing plant the lessee cannot make it otherwise by washing it on the premises and weighing only the concentrates transported by railroad. And if the defendant were to prevail in its general contention, that is, that it should pay only on concentrates, its argument now made as to the effect of the provision for weighing, if sustained, would prove its undoing as to every mine the product of which is transported by railroad off the premises for concentration. Its contention cannot prevail and we are not now concerned with an inquiry into the effect of the weighing provision as a term of the contract.

We get not much help from the cases. Counsel cite a few. They suggest for them indirect aid in the construction of the lease.

The state cites *Genet v. Delaware & H. Canal Co.* 136 N. Y. 593, 32 N. E. 1078, 19 L.R.A. 127; *Id.* 163 N. Y. 173, 57 N. E. 297; *Id.* 167 N. Y. 608, 60 N. E. 1111; *Id.* 186 N. Y. 422, 79 N. E. 437. Under the lease there involved it was held that a lessee who took inferior coal, not required to be taken, must pay royalty as upon other coal which it was required to take; that is, when the lessee took coal of any quality he took it as coal for which the royalty fixed by the lease must be paid.

The defendant cites a number of cases from Pennsylvania. They involve all sorts of arrangements for getting out coal, sometimes a sale in place, sometimes an ordinary lease, and sometimes a license. Sometimes the lessee gets all the coal by paying stipulated royalties on certain grades, in which event he gets the low grades without specific payment, and sometimes the contract is such that the title to the low grade remains in the lessor. It all depends upon the contract. The following are illustrative: *Girard Trust Co. v. Delaware & H. Co.* 246 Pa. St. 161, 92 Atl. 129, and cases cited; *N. Y. & P. Coal Co. v. Hillsdale C. & I. Co.* 225 Pa. St. 211, 74 Atl. 26; *Wright v. Warrior Run Coal Co.* 182 Pa. St. 514, 38 Atl. 491; *Lance v. Lehigh & W. B. Coal Co.* 163 Pa. St. 84, 29 Atl. 755; *Dunham v. Haggerty*, 110 Pa. St. 560, 1 Atl. 667.

The state cites *Ellis v. Cricket Coal Co.* 166 Iowa, 656, 148 N. W. 887. This case involved a lease of "merchantable and minable" coal. It discusses what is meant by "merchantable" and what is meant by "minable." It is of illustrative value in considering the term "merchantable shipping iron ore" in our state lease; but upon the general definition we do not understand the parties are in dispute and we are not interested in a minute consideration of it. The state does not claim the right to require its lessees to mine ore which cannot be mined and shipped at a profit. We do not emphasize the fact that in the case before us a profit results after the payment of the royalty, but it is a stipulated and found fact present in the case. To the Iowa case may be added *Flavelle v. Red Jacket C. C. & C. Co.* 82 W. Va. 295, 96 S. E. 600.

Our definite holding is that the lessee in a state mining lease who mines low grade ore, and washes it, and markets the concentrates, when the conditions are such that he can mine, wash and transport to the furnaces and sell and make a profit, after paying the state a 25 cents royalty on the crude ore mined, though he could not ship to the furnaces and wash there, if there were facilities, and have a profit, must pay the 25 cents royalty on the mined ore before washing and not on the concentrates. This is "ore mined and removed from said land," upon which the lessee promises to pay "at the rate of 25 cents per ton," and the coming into practical and profitable and common use of the treatment of the ore by the washing process, so as to make it usable, other conditions being as stated, results in making the mined ore in a practical sense and in the sense of the lease "merchantable shipping iron ore," just as much so as if the defects or impurities in the mined ore which made it not directly usable in the furnaces were obviated or removed by improved methods of furnace treatment.

Our conclusion is in accordance with practical construction. It is not uncommon for private leases to carry "washing" clauses permitting the treatment of low grade ore and providing for royalty on the basis of concentrates. The state leases do not.

The judgment is reversed with directions to amend the conclusions of law so as to require the defendant to pay a 25 cents royalty on the

16,021 tons mined, credit being given for the royalty paid on the concentrates, and to enter judgment accordingly.

Judgment reversed.

On December 12, 1919, the following opinion was filed:

PER CURIAM.

On further consideration of this cause after reargument a majority of the court adhere to the former decision; Chief Justice Brown and Associate Justice Holt dissenting.

It is so ordered.

On March 5, 1920, the following opinion was filed:

DIBELL, J.

A rehearing was granted upon the question whether the construction of the mining lease made in our decision offends the contract or due process of law clauses of the Federal Constitution. We state the claims made as applied to the situation before us and the result which we reach, and engage in no extended discussion.

1. The state mining lease is in fact a lease and not a sale of ore in place. *State v. Evans*, 99 Minn. 220, 108 N. W. 958, 9 Ann. Cas. 520; *Boeing v. Owsley*, 122 Minn. 190, 142 N. W. 129; *State v. Royal Mineral Assn.* 132 Minn. 232, 156 N. W. 128, Ann. Cas. 1918A, 145; *Orr v. Bennett*, 135 Minn. 443, 161 N. W. 165; *Minn. L. & T. Co. v. Douglas*, 135 Minn. 413, 161 N. W. 158; *State v. Cavour Mining Co.*, 143 Minn. 271, 173 N. W. 415.

2. In our decision it was held that a state mining lessee may, if he chooses, take from the mine and use low grade ore, rejecting by pick or shovel or other means dirt and rock and other waste material, after the manner of ordinary good mining, paying the stipulated 25 cents a ton royalty on such product, although under present furnace methods it is not usable in the furnaces in the condition in which the lessee takes it from the mine; but that the lessee is not entitled to take such product

to the washer, subject it to treatment or "beneficiation," and pay 25 cents per ton on the reduced tonnage of concentrates directly usable in the furnaces.

The defendant's contention is that our holding changes the nature of the mining lease from a lease in fact to a sale of ore in place. Such is not our view. Our holding was consistent with the theory of the state mining lease which we have maintained from the beginning. The holding that the lessee must pay the stipulated royalty upon the ore which he takes on the basis of tonnage before treatment, was not a holding that the lease is a sale of ore in place. It was an interpretation of the meaning of the lease as to the basis upon which royalty was to be paid. Our holding, stated in another way, was that the lease meant by the term "all the iron ore mined and removed," or "all iron ore so taken out, mined and carried away," upon which a 25-cents royalty was to be paid, the low grade ore which the lessee under the lease of "merchantable shipping iron ore" chose to take to the washer, and not upon the concentrates resulting from the treatment. This is not a change in the construction of the state lease. This is the only case ever before the court involving the question of the basis of payment in case of concentration and this is the first time, as we understand it, that the state's insistence upon a royalty upon the low grade ore going to the washer has been judicially attacked.

We have examined the cases cited by counsel. It may be noted that there is no legislation which the defendant claims impairs its contract. We see nothing in the claim of want of due process. We hold that our decision, to the effect that the lessee under a mining lease must pay on the tonnage of crude ore which he chooses to take to the washer and may not pay upon the reduced tonnage of concentrates, does not impair the obligation of the contract of lease nor offend the due process of law provision of the Federal Constitution. Upon this the court is agreed.

The judgment will stand reversed.

GENEVIEVE E. FARRAR v. LOCOMOTIVE ENGINEERS  
MUTUAL LIFE AND ACCIDENT INSURANCE ASSOCIATION.<sup>1</sup>

July 25, 1919.

No. 21,385.

**Insurance — presumption against suicide.**

1. If the evidence in an action on a policy of accident insurance is consistent with the theory of accidental death, the presumption which the law raises from the ordinary motives and principles of human conduct, requires a finding against suicide.

**Same — death caused by accident — burden of proof.**

2. When, by the terms of such policy, there can be no recovery in case of death, unless death was caused by accidental means, the burden of proving that it was so caused rests on the plaintiff.

**Same — evidence made question for the jury.**

3. Evidence considered and *held* within the rules above stated to be of such nature that reasonable minds might properly reach different conclusions as to the inferences fairly deducible therefrom, and that the trial court did not err in permitting a verdict of accidental death to stand.

**Same — declarations of decedent admissible.**

4. It was within the discretion of the trial court to receive testimony that the insured had expressed the belief that it was wrong to commit suicide, without specifically limiting the proof to declarations made immediately preceding the date of his death.

**Rulings on evidence — charge to jury.**

5. There were no prejudicial errors in the rulings on the admission of evidence or in the instructions to the jury.

Action in the district court for St. Louis county to recover \$2,000 upon defendant's accident indemnity policy. The answer alleged that the death of the insured was caused by suicide. The case was tried before Dancer, J., who when plaintiff rested denied defendant's motion

<sup>1</sup>Reported in 173 N. W. 705.

to dismiss the action and at the close of the testimony denied plaintiff's and defendant's motions for directed verdicts, and a jury which returned a verdict in favor of plaintiff. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

*Warner E. Whipple and Frank E. Randall, for appellant.*

*I. K. Lewis, for respondent.*

LEES, C.

Plaintiff is the widow of Arthur C. Farrar. She brought this action to recover on an indemnity accident policy, issued to him by defendant, in which she was named as beneficiary. She had a verdict, and defendant appeals from an order denying its motion in the alternative for judgment notwithstanding the verdict or for a new trial.

The policy provided for the payment of \$2,000 to plaintiff, if her husband's death should be caused by accident.

The complaint alleged that on the twenty-seventh day of January, 1916, the insured met with an accidental injury which contributed to and caused his death by accident on the twenty-sixth day of October, 1917. The answer denies that any accident which the insured met with on January 27, 1916, contributed to or caused his subsequent death, and alleges that the insured committed suicide. This allegation was put in issue by the reply.

1. The principal controversy centers around one issue of fact, plaintiff contending that the evidence justified a jury in finding that her husband's death was due to accident, and defendant contending that it conclusively appears that he committed suicide. The evidence has been exhaustively reviewed in the briefs and was discussed in the oral arguments with animation and thoroughness. We make no extended statement of it, but only refer to its salient features.

Mr. Farrar was a locomotive engineer employed by the Northern Pacific Railway Company for many years, and long a resident of Duluth. He and his wife were congenial; his financial circumstances were comfortable; he had no trouble or anxieties with one exception hereafter stated. He was 54 years old at the time of his death. On January 27,

1916, he met with an accident. While operating his engine, a collision with another engine occurred. He jumped from his cab to escape injury and was struck on the head by the journal boxes of the caboose attached to his engine. There was evidence tending to show that he never recovered from the effects of this injury, and his subsequent history indicates that his brain was affected. He was taken to a hospital immediately after the accident and received treatment there for a considerable time. He was restless and talkative, though normally a calm, reserved man. He complained that his head felt numb, and fainted twice. He recovered sufficiently to go to Omaha with his wife to visit his brother who was seriously ill. On the trip he talked with and introduced strangers to his wife. After his arrival he spent nearly all his time away from his brother whom he knew was in his last illness. Before he was injured he and his wife had planned a long trip, which they took shortly after his brother's death. It occupied several months and covered a large portion of the United States, with an excursion to Cuba and the Panama Canal. His conduct on the trip was unusual and indicative of mental disturbance. He had lapses of memory, which became more frequent after his return from the trip. He complained about his head, saying he could not think. He would take a coal bucket and go to a shed for coal, and come back without any and ask what he had gone after. He would soap his face and forget to wash it. He forgot time; forgot his meals; forgot to put on his underwear on arising in the morning, and forgot his dinner pail and overalls when he went to work. He constantly complained of being cold and put rugs under the doors and stuffed waste he carried in his pockets into the cracks around the windows. He also stuffed rags and waste into a pipe which conducted fresh air into his house. He began to fear for his own safety and regularly locked and bolted the doors and windows in his house, though he had never done so before. At times he would whine and cry like a child. Before he was hurt he was friendly with people he knew. After returning from his trip he did not want to meet anyone, and did not want his wife to go out so people would know they were at home.

This is the picture of Mr. Farrar painted by the evidence produced

by plaintiff. If it was a true picture, the jury was clearly justified in finding that during the final months of his life he was broken mentally and incapable of forming or executing any reasonable plan of action.

The testimony introduced in defendant's behalf casts doubt upon the fidelity of the likeness drawn by plaintiff's evidence. It depicts Mr. Farrar as an eccentric man before he was hurt. It appears that on the journey already referred to he kept a diary which was put in evidence and tends to show that he intelligently observed objects of interest along the route traversed. Within a few days after his return he resumed his occupation and ran a switch engine in the railroad yards at Duluth for more than a year, without exhibiting to the men who worked with him any evidence of mental derangement or change from his former condition as they had observed it. He continued to work until a few days before his death, but did not work steadily, and would stay at home every week from two to three days, spending most of the time in bed. Great stress is laid upon the fact that he was able to run his engine successfully after he was hurt. There was medical testimony, produced by plaintiff, to the effect that after many years service an engineer does, automatically, the things his daily duties require him to do.

In our judgment, the evidence as a whole would justify a jury in finding that, up to the time of his death and as a result of the injury to his head, Mr. Farrar was steadily deteriorating both mentally and physically, and that there was a marked loss of memory causing him often to forget to finish that which he had begun to do.

For 16 years prior to his death he and his wife lived in a house without modern conveniences, where gas was not used. A coal range was kept in the kitchen, and it was in that room that he generally sat when at home. A few days before his death this house was sold, and he and his wife moved into another which was supplied with gas and other conveniences. It was heated by a furnace and there was a gas stove in the kitchen. The coal range was sold contrary to his wishes, his wife explaining to him that if the house was cold they would "use the gas" to take the chill off. The gas stove was new, had not been properly adjusted, and during the four or five days it had been in use would go



out after it was lighted and would pop and blow a match out when it was being lighted.

About 1:30 p. m. on the day of Mr. Farrar's death it became necessary for Mrs. Farrar to go to the business district of Duluth to attend to a number of errands. One was the transfer of the bank account then in Mr. Farrar's name to their joint account, so that both could check against it. Mr. Farrar had been at home since they moved into the new house, spending most of the time in bed. When his wife told him she was going out to attend to her errands, he offered to go for her, but finally decided not to do so. She returned to the house shortly after 4 p. m. Before she left she bolted the back door but left the front door unlocked. When she returned, all the doors were locked and the window shades in the kitchen were down. Being unable to get in the house, she called on a neighbor for assistance. A window was broken and the house entered. Mr. Farrar was found lying on an ironing board extending from the kitchen sink to the kitchen table. His head rested on a cushion he had placed on the ironing board and was near the oven of the gas stove. All the burners—seven or eight in number—were turned on and none were lighted. He had been overcome by the escaping gas, was unconscious, and died without regaining consciousness. Rags and pieces of carpet were stuffed about the cracks under the kitchen doors and in the flue over the gas stove. Some kitchen furniture was pushed against the doors. There was testimony that, as her husband's body was being carried out, Mrs. Farrar said: "Arthur, you said you would do it and you did do it."

If Mr. Farrar had been a man of normal mind and memory, the circumstances surrounding his death would compel the conclusion that it was due to self-destruction, but the jury could not well find that his mind was normal. The evidence which we have briefly outlined points quite conclusively to a state of mental aberration. The situation at the house at the time of his death must be viewed with that fact in mind. On the one hand, it is strenuously contended that the situation we have described points conclusively to suicide, while, on the other, it is contended that it falls short of overcoming the presumption against suicide and is not irreconcilable with the claim of death by accident.

In weighing and considering the evidence, we have had in mind the rule that if the evidence is consistent with the theory of accidental death, the presumption which the law raises from the ordinary motives and principles of human conduct requires a finding against suicide, and the applications of the rule which this court has made in previous cases. *Lindahl v. Supreme Court I. O. F.* 100 Minn. 87, 110 N. W. 358, 8 L.R.A.(N.S.) 916, 117 Am. St. 666; *Kornig v. Western Life Ind. Co.* 102 Minn. 31, 112 N. W. 1039; *Zearfoss v. Switchmen's Union of North America*, 102 Minn. 56, 60, 112 N. W. 1044; *Peterson v. Prudential Ins. Co.* 115 Minn. 232, 132 N. W. 277; *McAlpine v. Fidelity & Casualty Co.* 134 Minn. 192, 158 N. W. 967; *State v. District Court for St. Louis County*, 138 Minn. 138, 164 N. W. 582.

We have also given weight to the fact that by the terms of the policy itself, without regard to defendant's by-laws relating to suicide, there could be no recovery, unless death was caused by accidental means, and that the burden of proving that it was so caused rests upon plaintiff. *Huestis v. Aetna Life Ins. Co.* 131 Minn. 461, 155 N. W. 643; *McAlpine v. Fidelity & Casualty Co. supra*. We have noted the absence of evidence revealing the usual motives or causes which have prompted men to commit suicide or manifesting a previous suicidal intent. We have considered Mr. Farrar's conduct prior to the day of his death; his attempts to guard against draughts in his house; his desire for warmth and habitual complaints that he was cold when others were comfortable; his unfamiliarity with gas stoves and the defective condition of the stove in his kitchen; his lapses of memory; his dislike of visitors and abnormal desire to have it appear that his house was unoccupied; and from these and other circumstances of minor importance, but all tending to support plaintiff's contention that his death was accidental, we hold that reasonable minds might properly reach different conclusions as to the inferences fairly deducible from the evidence, and that, therefore, the trial court properly permitted the verdict to stand.

It is suggested in appellant's brief, quoting Winslow, J., in *Rens v. N. W. Mut. R. Assn.* 100 Wis. 266, 75 N. W. 991, that such a holding

"would amount to a pitiable stultification of the reasoning powers." The case has been tried twice and we are unwilling, upon the record before us, to convict the members of the two juries who found in plaintiff's favor and the able and impartial district judges who presided at the trials of having affronted reason in passing as they did upon the vital question in the case. To hold that different minds could not reasonably come to different conclusions from the evidence and that indubitably the case is one of suicide would be to arrogate to ourselves a monopoly in the ability to reason logically and honestly, as was pointed out in *Agen v. Metropolitan Life Ins. Co.* 105 Wis. 217, 230, 80 N. W. 1020, 76 Am. St. 905, by the same able jurist whose remark in the *Rens* case is quoted for our edification.

2. Mrs. Farrar, when called in rebuttal, was asked whether her husband had ever expressed himself on the subject of suicide. Over defendant's objection, she answered: "He did not believe in that sort of thing at all." Defendant moved that the answer be stricken out. There was no ruling on the motion. Plaintiff's counsel then admonished the witness not to state her husband's belief, but to give his expressions on the subject, and she then answered, without objection, that "he often expressed himself in this way, that it was wrong for one to do that sort of thing."

The first answer should have been stricken out, but we think defendant was not prejudiced because it was not stricken, in view of the answer finally given without objection, and that under the rule stated in *Hale v. Life I. & I. Co.* 65 Minn. 548, 68 N. W. 182, it was within the discretion of the trial court to receive the testimony without specifically limiting it to a time immediately preceding Farrar's death.

3. We find no prejudicial error in the rulings on the admission of evidence to which exception was taken. A sufficient foundation was laid to justify the ruling that the testimony of a witness given at the first trial might be read, it appearing with reasonable certainty that she was no longer within the jurisdiction of the court.

There was no prejudicial error in the instructions given or in the refusal to give the instructions requested by defendant. We regard the

charge as a clear and fair statement of the legal principles by which the jury should be guided in weighing the evidence and returning a verdict.

The order appealed from is affirmed.

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IN THE MATTER OF THE APPEAL FROM THE ORDER OF  
THE COUNTY BOARD OF MEEKER COUNTY MADE AUGUST  
9, 1916, ORGANIZING SCHOOL DISTRICT NO. 58.

INDEPENDENT SCHOOL DISTRICT NO. 47 OF MEEKER  
COUNTY AND OTHERS v. MEEKER COUNTY.<sup>1</sup>

January 30, 1920.

No. 21,266.

Judgment for costs against defendant county vacated.

Motion to set aside judgment for costs against defendant county entered without notice. *Held*: The county board did not subject themselves or the county to costs by granting the petition to form a school district, nor could petitioners or the consolidated school district by certiorari or by appeal subject the county to a judgment for costs. After the petitioners appealed to the district court, the county attorney had no authority to answer in its behalf. The motion should be granted on the authority of *Schweigert v. Abbott*, 122 Minn. 385, 391, 142 N. W. 723 [Reporter].

The motion of Meeker county for an order vacating the judgment for costs entered and docketed in the office of the clerk of the supreme court, insofar as it imposed a money liability on the county, because (1) it was unauthorized, (2) because the county did not appear or take any part in the litigation, but the same was carried forward by consent between Independent School District No. 47 and petitioners, and (3) because the costs and disbursements were improperly taxed and included in the judgment without notice to or the knowledge of said county, and Meeker county had no opportunity to object to or oppose such taxation of costs or entry of judgment, was granted.

*Raymond H. Dart*, County Attorney, for Meeker County.

*J. M. Freeman* and *T. O. Gilbert*, for the Independent School District.

<sup>1</sup>Reported in 175 N. W. 992.

**PER CURIAM.**

On application to set aside the judgment for costs against the county of Meeker.

As appears from the records in the case, page 169 *supra*, 173 N. W. 850, certain persons petitioned the county board of Meeker county for a school district to be carved out of a consolidated district. The petition was granted. The officers of the consolidated district appealed to the district court, and there presented a formal complaint, naming themselves individually, and as officers of the district, appellants, and the county of Meeker as respondent. An answer was served and signed by the county attorney, and underneath his signature two other attorneys appended their names as "attorneys for the petitioners herein." The latter attorneys tried the appeal, but the county attorney was present and gave testimony. The district court reversed the action of the county board, and, in the appeal to this court, the only appellant named was the county. The notice of appeal and the brief in behalf of the appellant purports to be signed by the same attorneys who signed the answer.

The county attorney claims that there was an informal talk and understanding when the case came before the court below that the county was not interested in the controversy, but that it would have to be carried forward by the officers of the consolidated district on the one hand and the petitioners on the other; that pursuant to such understanding the attorneys who signed the answer in behalf of the petitioners took charge of the case, and took all the steps in the appeal to this court, and, if the county attorney's name appears upon any of the papers thereafter served, he did not sign, but assumes that the petitioners' attorneys appended his name out of courtesy. The respondents in this court deny the understanding claimed by the county attorney, and assert that the two attorneys referred to appeared for the county as well as for the petitioners; that they so understood, and, for that reason, did not demand a bond for costs, the county being permitted to appeal without giving such bond.

The county board, in determining the controversy, did not subject themselves or the county to costs, nor could the petitioners or the consolidated school district by certiorari or appeal have exposed the county to the danger of being subjected to a judgment for costs therein. The county was not interested in the appeal either to the district court or to this court. It was under no obligation or legal duty to appeal, and the county attorney had no authority to answer in its behalf after the appellants appealed from the order of the county board, and, in disregard of good practice, made the county instead of the petitioners the respondent in the appeal to the district court. We think the application now made to vacate the judgment of costs, entered against the county, without notice served on the county attorney,

should be granted on the authority of *Schweigert v. Abbott*, 122 Minn. 383, 391, 142 N. W. 723, where the clerk's taxation of costs was vacated against a county superintendent who had been made a party to the litigation when the law and proper procedure did not require him to be a party thereto. The judgment for costs entered in this court is vacated and set aside.

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WILLIAM J. PALM v. CITY OF MINNEAPOLIS AND ANOTHER.  
MINNEAPOLIS STEEL & MACHINERY COMPANY,  
APPELLANT.<sup>1</sup>

June 6, 1919.

No. 21,242.

**Case followed.**

Action in the municipal court of Minneapolis to recover \$825 for injuries received in tripping over a wire strung and maintained by defendant about one foot above the ground between the grass plot and the sidewalk. The separate answer of Minneapolis Steel & Machinery Company alleged among other matters, that the fall of plaintiff was caused by his unlawful act in attempting to trespass upon the premises of defendant by traveling across the new seeding on defendant's boulevard. The case was tried before Charles L. Smith, J., who when plaintiff rested and at the close of the testimony denied motions of the city of Minneapolis for a directed verdict and at the close of the testimony denied a motion of the machinery company for a directed verdict, and a jury which returned a verdict for \$525 against the defendant company. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, the Minneapolis Steel & Machinery Company appealed. Affirmed.

*Lewis Severance*, for appellant.

*Jesse Van Valkenburg*, for respondent.

**PER CURIAM.**

This case on the merits comes within the rule stated and applied in *McDonald v. City of St. Paul*, 82 Minn. 308, 84 N. W. 1022. The evidence supports the verdict, and the record discloses no reversible error. The answer does not present the question whether the rights of the parties are controlled by the Workmen's Compensation Act, and the evidence fails to bring them within its provisions. Plaintiff is a retired clergyman, and at the time of his injury was engaged at the instance of the Y. M. C. A. of Minneapolis in distributing advertising matter about the city, but whether under employ-

<sup>1</sup>Reported in 172 N. W. 692.

ment for compensation the record does not show. The workmen's statute therefore has no application.

Order affirmed.

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CARL R. WILDUNG v. SECURITY MORTGAGE COMPANY OF  
AMERICA AND OTHERS.<sup>1</sup>

June 6, 1919.

No. 21,288.

Appeal from findings and conclusions dismissed, because no motion for new trial or entry of judgment.

Action in the district court for Ramsey county to recover \$12,200 for conversion. Charles E. Bowen, attorney for plaintiff, obtained an order requiring defendants to show cause why his motion to vacate a stipulation for settlement and dismissal of the action and for an order awarding him the fees to which he was entitled for services rendered plaintiff in the action, and for judgment against defendants for the amount so determined, should not be granted. The matter was heard by Olin B. Lewis, J., who made findings that plaintiff's attorney had a valid lien upon the cause of action for \$1,119.18; that for the purpose of enforcing and satisfying the lien the stipulation, release and dismissal in said action, together with the order of court releasing the garnishee in said action, be vacated and set aside and the cause of action reinstated to the extent and in the amount due plaintiff's attorney in the sum of \$1,130.18. From the findings of fact, conclusions of law and order for judgment, defendants appealed. Appeal dismissed.

*Todd, Fosnes, Sterling & Nelson*, for appellants.

*Charles E. Bowen*, pro se.

PER CURIAM.

This is an attempt to appeal from findings of fact, conclusions of law and an order for judgment. No motion for a new trial was made and no judgment entered. The appeal must, therefore, be dismissed and the case remanded to the court below for further proceedings. If an appeal is promptly taken after judgment is rendered in the lower court, it may be submitted upon the record and briefs on file in this court and upon the oral arguments which have been presented, provided a stipulation of the parties for such submission is filed herein.

Appeal dismissed.

<sup>1</sup>Reported in 172 N. W. 692.

JULIUS M. STEABNER v. MINNEAPOLIS & ST. LOUIS  
RAILROAD COMPANY AND OTHERS.<sup>1</sup>

June 6, 1919.

No. 21,462.

**Case followed.**

Plaintiff obtained from the supreme court an order to show cause why a writ of mandamus should not issue, directed to the Honorable Frederick N. Dickson, one of the judges of the district court for Ramsey county, requiring him to make an order remanding a certain action and changing the venue thereof to Yellow Medicine county. Writ denied.

*Davis & Michel*, for appellant.

*M. M. Joyce* and *R. B. Alberson*, for respondent.

**PER CURIAM.**

The decision of the question involved in this case is controlled by *State v. Tryholm*, 139 Minn. 389, 166 N. W. 533, which we follow and apply. The order to show cause is therefore discharged.

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JOHN W. LINDELL v. CITIZENS ICE & FUEL COMPANY.<sup>2</sup>

June 13 1919.

No. 21,287.

**Negligence — contributory negligence — question for jury.**

Plaintiff alighted from a street car, passed around the end of the car and as he reached the parallel street car track was struck by defendant's delivery team traveling in the same direction as the street car. The driver of the team saw the car stop, three or four passengers alight and pass around the end of the car toward the other side of the street, but apparently made no effort to check his team. Plaintiff followed these passengers. Plaintiff testified he looked to the east—the direction in which the street car was traveling—but not the west. *Held*: The question of defendant's negligence and that of plaintiff's contributory negligence were for the jury. [Reporter.]

<sup>1</sup>Reported in 172 N. W. 959.

<sup>2</sup>Reported in 172 N. W. 302.



Action in the district court for Ramsey county to recover \$3,000 damages for injuries received in a collision with defendant's truck. The answer alleged negligence on the part of plaintiff. The case was tried before Dickson, J., who when plaintiff rested denied defendant's motion for a dismissal of the action and at the close of the testimony its motion for a directed verdict, and a jury which returned a verdict for \$1,250. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

*Todd, Fosnes, Sterling & Nelson, for appellant.*

*Samuel A. Anderson, for respondent.*

**PER CURIAM.**

Plaintiff had a verdict for personal injuries and defendant appealed from an order denying an alternative motion for judgment notwithstanding the verdict or for a new trial.

Two street-car tracks extend along East Seventh street in the city of St. Paul. Eastbound cars pass over the south track, westbound over the north track. Plaintiff alighted from an eastbound car at a street intersection, passed around the rear end of the car toward the north side of the street, and as he reached the north track was struck, knocked down and injured by defendant's delivery team. The delivery team was proceeding at a trot in the same direction as the car. The driver saw the car stop to discharge passengers, and saw three or four passengers alight and pass around the end of the car toward the north side of the street, but apparently made no effort to check his team. The other passengers were ahead of plaintiff and passed in front of the team without injury, but plaintiff was struck and injured. Defendant does not seriously contend that its driver was free from negligence, but insists that plaintiff was guilty of contributory negligence as a matter of law. Plaintiff followed other passengers who alighted from the car and passed around the end of it ahead of him. He testified that he looked toward the east for cars going west, but did not look toward the west and never saw the team until it struck him. He also states that he did not expect vehicles going east to be in that part of the street. We are of opinion that the questions of defendant's negligence and of plaintiff's contributory negligence were both for the jury.

**Affirmed.**

JOHN H. GOWAN v. WILLIAM G. McADOO.<sup>1</sup>

July 11, 1919.

No. 21,280.

**Case followed.**

From an order of the district court for Carlton county, Dancer, J., denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. From an order, Dancer, J., substituting William G. McAdoo, Director General of Railroads, as defendant, and dismissing the action as to the Northern Pacific Railway Company, plaintiff appealed. Order denying defendant's motion affirmed; order substituting Director General of Railroads reversed.

*Tautges, Bissell & Wilder*, for plaintiff.

*Charles Donnelly* and *D. F. Lyons*, for defendants.

**PER CURIAM.**

Appeal by defendant from an order denying a motion for a new trial and by plaintiff from an order dismissing the action as to the Northern Pacific Railway Company and substituting William G. McAdoo, as Director General of Railroads, as defendant.

The disposition of both appeals in this action is controlled by the decision in *Gowan v. McAdoo*, supra, page 227, 173 N. W. 440.

The order denying defendant's motion for a new trial is affirmed. The order substituting the Director General of Railroads for the original defendant is reversed.

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**ALEX CHERRY AND ANOTHER, COPARTNERS v.  
HALES & EDWARDS COMPANY.<sup>2</sup>**

July 11, 1919.

No. 21,341.

**Sale — breach of warranty.**

Action on express warranty of a carload of corn as sound, sold by sample. Evidence that the corn was spoiled and of no value. *Held*: The correspondence and the telephone conversation between the parties were properly admitted in evidence and the evidence sustained the verdict in favor of plaintiff. [Reporter.]

<sup>1</sup>Reported in 173 N. W. 443.

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<sup>2</sup>Reported in 173 N. W. 400.

Action in the district court for Becker county to recover \$1,200 for false representations in the sale of a carload of corn. The answer alleged that on or about March 20, 1918, plaintiffs purchased and defendant sold and delivered to them, on board of car, at Minneapolis, Minnesota, 666 bushels of corn on cob at the agreed price of \$1.40 per bushel, totaling the sum of \$932.40, which purchase price, on or about the twenty-seventh of that month, plaintiffs paid. The case was tried before Parsons, J., who when plaintiffs rested denied defendant's motion to dismiss the action, and at the close of the testimony its motion for a directed verdict, and a jury which returned a verdict for \$910.36. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

*P. F. Schroeder and E. C. Hales*, for appellant.

*Johnston & Carman*, for respondent.

**PER CURIAM.**

Action for damages for the breach of an alleged warranty of the condition and quality of a carload of corn sold by defendant to plaintiff, in which plaintiff had a verdict and defendant appealed from an order denying its motion for judgment or a new trial.

The assignments of error present no question of importance or which requires extended attention in an opinion.

The complaint alleges that the corn was expressly warranted as sound in quality and condition, and that as a part of the transaction samples of the corn were furnished by defendant, upon which, together with the express warranty, plaintiff relied in making the purchase. The evidence fully supports the complaint and justified the jury in finding the facts accordingly. All the correspondence between the parties leading up to the contract, together with the telephone conversation had by them in reference to the proposed sale, was properly admitted in evidence, and therefrom and not from any segregated part thereof recourse must be had in determining the character and terms of the contract. So looking at the record there remains no substantial dispute in the case on the merits. There was a breach of the warranty, for the evidence shows that the corn was spoiled and of no value whatever. The amount of the verdict corresponds with the evidence, and there is no merit to the contention that the damages are excessive.

This covers all that need be said in disposing of the appeal. We find no error in the record.

Order affirmed.

EDITH SKILLINGS v. F. A. ALLEN.<sup>1</sup>

July 18, 1919.

No. 21,362.

**Case followed.**

Action in the district court for Crow Wing county to recover \$1,000. Defendant's demurrer to the complaint was overruled, McClenahan, J., and the questions presented by the demurrer certified as important and doubtful. From the order overruling the demurrer, defendant appealed. Affirmed.

*C. D. & R. D. O'Brien*, for appellant.

*A. D. Polk* and *L. B. Kinder*, for respondents.

**PER CURIAM.**

This is an appeal from an order overruling a demurrer to the complaint interposed on the ground that it stated no cause of action. The court certified that the question raised was important and doubtful.

This action was brought by the wife of the plaintiff in the case of Bert L. Skillings v. Allen, *supra*, page 323, and presents the identical questions which were decided in that case adversely to appellant.

Order affirmed.

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HOMER C. BAER v. WASECA MILLING COMPANY.<sup>2</sup>

April 17, 1919.

No. 21,366.

**Foreign corporation — transfer of stock — lien of corporation.**

Action to compel a South Dakota corporation, authorized to do business in Minnesota, to transfer on its books certain shares of its capital stock which plaintiff bought of the person to whom they were issued. The answer alleged as one defense that the court had no jurisdiction of the subject matter, and as another defense that plaintiff's assignor had never paid for the stock, and by virtue of the South Dakota statute and the by-laws adopted pursuant thereto, defendant had a lien on all the stock until it was paid for in full, and no stock could be transferred on the books until it had been paid

<sup>1</sup>Reported in 173 N. W. 665. <sup>2</sup>Reported in 171 N. W. 767, 173 N. W. 401.

for in full and all liens satisfied. The trial court granted plaintiff's motion to make this allegation more definite and certain and to set out the by-laws referred to in full and the date of their passage, and defendant was allowed ten days in which to amend its answer and set out the by-law and the date of its passage. From this order defendant appealed. *Held*:

(1) While the order did not specify what would be done in case it was not obeyed, such disobedience would be sufficient ground for the court to strike the indefinite allegation from the answer or bar defendant from introducing testimony in support of them. As that would involve the merits of the action, the order is appealable within the doctrine of *Lovering v. Webb Publishing Co.* 108 Minn. 201, 120 N. W. 688.

(2) If it is necessary to plead the existence of the by-law, there was no abuse of discretion in requiring defendant to set forth its substance and date of its adoption.

(3) It cannot be presumed a transferee of stock in a corporation has knowledge of the corporation by-laws.

(4) The relief asked does not involve the exercise of visitatorial powers or management of the internal affairs of the corporation. It merely involves whether a citizen of Minnesota, who has bought stock from one to whom the corporation issued it, is entitled to have it transferred on the books of a foreign corporation duly licensed to do business in Minnesota.

(5) If there is any amount due the corporation from the seller of the stock for which it has a lien, the Minnesota courts can protect and enforce the same as against the holder of the stock. [Reporter.]

Action in the district court for Ramsey county to compel defendant to transfer certain shares of stock upon its books and to issue to plaintiff new certificates therefor. Plaintiff's motion for an order requiring the answer to be made more definite and certain and the by-laws referred to therein to be set out in full, as well as the date thereof, was granted by Michael, J. Respondent's motion to dismiss the appeal was denied. Affirmed.

*Moonan & Moonan*, for appellant.

*Moore, Oppenheimer & Peterson*, for respondent.

**PER CURIAM.**

On plaintiff's motion the court made an order requiring defendant to make its answer more definite and certain by setting out in words or substance the by-laws under which it asserted a lien on the capital stock in controversy. Defendant appealed from this order, and plaintiff moves to dismiss the appeal on the ground that the order is not appealable.

An order refusing to require a pleading to be made more definite and certain is not appealable. *American Book Co. v. Kingdom Pub. Co.* 71 Minn.

363, 73 N. W. 1089; *State v. O'Brien*, 83 Minn. 6, 85 N. W. 1135. An order requiring a pleading to be made more definite and certain, and providing that the pleading shall be stricken out unless made more definite and certain, is appealable. *Lovering v. Webb Pub. Co.*, 108 Minn. 201, 120 N. W. 688, 121 N. W. 911. This latter case distinguished the order there considered from the orders considered in the prior cases on the ground that it was in effect an order striking out the pleading and therefore involved the merits of the action. The order in the instant case makes no provision for the situation which would exist in the event of a failure to obey it. But a failure to comply with the order would be a sufficient ground for the court to strike the indefinite allegations from the answer, or bar defendant from introducing evidence in support of them. 31 Cyc. 651; *Lipman v. Bechhoefer*, 141 Minn. 131, 169 N. W. 536. This order may produce the same result as the order in the case cited, and we are of opinion that it is within the doctrine of that case and appealable as an order involving the merits. The motion to dismiss the appeal is denied.

On July 18, 1919, the following opinion was filed:

**PER CURIAM.**

Action against a South Dakota corporation, authorized to do business in this state, to compel the transfer upon the books of the corporation of certain shares of its capital stock which plaintiff purchased of the person to whom the corporation had issued the same. The answer alleged as one defense that the court had no jurisdiction of the subject matter of the action. And as a further defense alleged that plaintiff's assignor had never paid for the stock; that its par value was \$10,000; and "under and by virtue of the statute of the state of South Dakota and the by-laws passed pursuant thereto the defendant has a lien upon all the stock until the same is paid in full and no stock can be or is entitled to transfer on the books of said company until paid for in full and all liens satisfied." Plaintiff moved that the part quoted be made more definite and certain and the by-laws referred to, be set out in full, as well as the date of the passage thereof. The court granted the motion and required defendant within ten days from the date of the order to serve an amendment to the answer, setting out either in words or substance the by-law referred to and the date of its passage. The appeal is from this order.

Orders requiring a pleading to be made more definite and certain rest largely in the discretion of the trial court. *Young v. Lindquist*, 126 Minn. 414, 148 N. W. 455. If it be necessary to plead the existence of the by-law, there surely was no abuse of discretion in requiring defendant to set forth its

substance and date of adoption. It cannot be presumed that a transferee of stock in a corporation has knowledge of the corporation by-laws.

The case of *Guilford v. Western Union Tel. Co.* 59 Minn. 332, 61 N. W. 324, as we read it, sustains the proposition that the courts of this state have jurisdiction to grant the relief asked by plaintiff. The relief does not involve the exercise of visitatorial powers or the management of the internal affairs of the corporation. It merely involves whether a citizen of this state, who has bought stock from one to whom the corporation has issued it, is entitled to have it transferred on the books of the corporation. The corporation is duly licensed to do business in this state. If there is any amount due the corporation from the seller of the stock which is a lien thereon, the courts of this state should have no difficulty in protecting and enforcing the same as against the holder of the stock.

Order affirmed.

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FARIBAULT PACKING & PRODUCE COMPANY v. O. O.  
STORLIE.<sup>1</sup>

July 18, 1919.

No. 21,507.

Dismissal of appeal — case followed.

Motion for new trial on the grounds (1) that the verdict was not justified by the evidence; and (2) errors in law, was granted, but the order was silent on the grounds therefor. Appeal from the order, and motion to dismiss the appeal granted on the authority of *Heide v. Lyons*, 128 Minn. 488, 151 N. W. 139. [Reporter.]

Appeal and error — grant of new trial without giving reason — effect of statute.

Section 7828, G. S. 1913, to the effect that the court shall not presume that an order granting a new trial which is silent as to the ground thereof, was granted on the ground that the verdict was not justified by the evidence, was intended to abolish a rule of the court which permitted such presumption. It can have no effect in determining the appealable character of the order. [Reporter.]

PER CURIAM.

Motion to dismiss an appeal from an order granting a new trial. The

<sup>1</sup>Reported in 173 N. W. 400.

motion is granted. The case comes within the rule stated and applied in *Heide v. Lyons*, 128 Minn. 488, 151 N. W. 139. There, as in the case at bar, the motion for a new trial was based upon the grounds: (1) That the verdict was not justified by the evidence; and (2) errors in law. The order granting a new trial was silent as to the grounds thereof. The order in this case is likewise silent on that point. The two cases cannot be differentiated. The provision found in G. S. 1913, § 7828, to which counsel for appellant calls attention, to the effect that the court shall not presume that an order granting a new trial which is silent as to the ground thereof was granted on the ground that the verdict was not justified by the evidence, was intended to abolish a rule of the court which permitted such presumption, and can have no effect in determining the appealable character of the order.

Appeal dismissed.

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STATE v. J. B. IRWIN AND OTHERS.<sup>1</sup>

July 18, 1919.

No. 21,526.

Certification unauthorized by statute.

J. B. Irwin and others were indicted by the grand jury of Hennepin county charged with the crime of entering into a combination and understanding tending to fix the price of milk, tried in the district court for that county before Giddings, J., acting for the judges of that district, who certified to the supreme court as important and doubtful the questions: "Is there a fatal variance between the allegations of the indictment and the proof relied upon by the state, as above stated?" "In view of the statement of the county attorney that he will rely upon proof tending to show that whatever control was exercised by the defendants over the sale of milk or fixing the price thereof in the city of Minneapolis, at the time mentioned in the indictment, was by reason of their membership in and official connection with a co-operative corporation organized under section 6487 of chapter 58 of the General Statutes of Minnesota for the year 1913, and in view of the passage by the legislature of chapter 82 of the Session Laws of 1919, can the defendants now be tried under said indictment and, if found guilty, punished under the laws of this state?" Dismissed and remanded.

*Frank M. Nye* and *William M. Nash*, County Attorney, for the state.

*M. D. Munn* and *Robert Jamison*, for defendants.

<sup>1</sup>Reported in 178 N. W. 575.



PER CURIAM.

For the reasons stated in *State v. Wellman*, *infra*, the certification of this cause to this court for the determination of the question certified is dismissed and the cause remanded to the court below.

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STATE v. HARVEY WELLMAN.<sup>1</sup>

July 18, 1919.

No. 21,527.

**Criminal law — certification unauthorized by statute.**

Motion to quash an indictment and for the discharge of defendant, on the ground that proof of the facts stated by the county attorney in his opening address to the jury would not warrant a conviction of violation of the statute on which the indictment was founded. The trial court discharged the jury and certified the cause to the supreme court. The certification of the cause was dismissed. *Held*:

(1) The facts do not bring the case within the statute providing for such review. G. S. 1913, § 9251. The question does not arise upon a demurrer or special plea to the indictment nor has there been a conviction thereunder.

(2) The trial court has not decided the question presented by the motion, an essential prerequisite.

(3) The question raised by a motion at the trial challenging the sufficiency of the indictment, or the sufficiency of the evidence to justify a verdict of guilty, can be certified to the supreme court only after defendant has been convicted. [Reporter.]

Harvey Wellman was indicted by the grand jury of Hennepin county. The proceedings in the district court for that county at the trial before Fish, J., are stated in the opinion. The court certified the question to the supreme court. Dismissed and remanded.

*John Berg*, for defendant.

*William M. Nash*, County Attorney, and *Floyd B. Olson*, for the state.

PER CURIAM.

On the trial of this cause and immediately after a jury had been impaneled to try the issues presented by the indictment and defendant's plea of

<sup>1</sup>Reported in 173 N. W. 574.

not guilty, and, after the county attorney had made his opening statement to the jury, counsel for defendant interposed a motion to quash the indictment and for the discharge of defendant, on the ground that on the facts stated by the county attorney there could be no conviction, for such facts if established would not constitute a violation of the statute on which the indictment is founded. Thereupon the court discharged the jury and certified the cause to this court for the determination of the question thus raised.

The certification of the cause to this court must be dismissed. The facts do not bring it within the statute providing for such review. G. S. 1913, § 9251. The question certified does not arise upon a demurrer or special plea to the indictment, nor has there been a conviction thereunder. *State v. Toole*, 124 Minn. 532, 144 N. W. 474; *State v. Billings*, 96 Minn. 533, 104 N. W. 1150. Neither has the trial court decided the question presented by defendant's motion; an essential prerequisite. *State v. Byrud*, 23 Minn. 29; *State v. Smith*, 116 Minn. 228, 133 N. W. 614. A question arising at the trial by a motion challenging the sufficiency of the indictment or the sufficiency of the evidence to justify a verdict of guilty, can be certified to this court only after the defendant has been convicted. And a question which the trial court has not decided cannot be certified up in any case.

The proceedings in this court are therefore dismissed and the cause remanded for further proceedings.

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PERIODICAL PRESS COMPANY v. SHERMAN-ELLIOTT  
COMPANY.<sup>1</sup>

July 25, 1919.

No. 21,298.

**Breach of printing contract — measure of damages — questions for jury.**

Action for breach of printing contract. One hundred thousand copies were ordered. Five thousand had been delivered when defendant repudiated the contract. Defense was lack of authority of agent of defendant to give the written order. The complaint claimed as damages (1) the amount expended in carrying out the contract up to the time it was repudiated; (2) the net profit on the job. Verdict for \$1,000. *Held*:

(1) Whether the agent had such authority and whether there had been ratification of his acts, were proper questions for the jury.

<sup>1</sup>Reported in 174 N. W. 516.

(2) If in one respect there was an inadvertent misstatement of the evidence in the charge to the jury, it should have been called to the attention of the trial judge at the time.

(3) The charge to the jury was prejudicial to defendant. The loss on the 5,000 copies furnished was \$400. Recovery cannot be allowed on the actual cost of the part performed and also on the net profits of the unperformed part. [Reporter.]

Action in the district court for Hennepin county to recover \$3,881.80 for breach of contract. The answer alleged that on or about April 3, 1917, plaintiff attempted to deliver to defendant a quantity of booklets but that it refused to receive any of said booklets or any part thereof. The case was tried before Hale, J., who when plaintiff rested denied defendant's motion to dismiss the action, and at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for \$1,000. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Remanded for retrial of the issue of amount of damages.

*Edward Nelson and A. T. Larson, for appellant.*

*Brady, Robertson & Bonner, for respondent.*

**PER CURIAM.**

Action to recover damages for breach of a contract, under which plaintiff was to print and furnish 100,000 souvenir booklets for defendant. Plaintiff alleged that it furnished and delivered 5,000 and that defendant then repudiated the contract. Plaintiff had a verdict for \$1,000 damages and defendant appeals from the order denying a new trial.

The contract was a written order signed by an alleged agent for defendant. Lack of authority to give the order was the chief defense, and the bulk of the evidence is directed thereto. We are agreed that the record made this a proper question for the jury, as well as the one whether in the absence of direct authorization there had been ratification of the acts of the agent in the premises. On this branch of the case the court's charge is very full and clear. An isolated statement in the charge to the effect that it was admitted that Brehany was the general manager of defendant is taken exception to. If this were a misstatement of the evidence, it was an inadvertence which should have been called to the court's attention at the time. It was allowed to pass unchallenged. It could not have been deemed of much importance then to appellant's counsel, and rightly so we think.

There was no prejudicial error in the rulings on the reception of evidence.

The complaint claimed as damages: (1) The amount that had been ex-

pended in carrying out the contract up to the time it was repudiated; and (2) the net profit upon the job. And on the question of damages the court charged: "If the plaintiff is entitled to recover anything, it is entitled to recover the fair and reasonable cost of printing the 5,000 booklets (I think it was 5,000). \* \* \* In addition to that it is entitled to recover, as its profits you might say, what it could have recovered if it had carried out the contract. If it had been permitted to carry out the contract, it would have been entitled to recover as profits the difference between what it would have cost it to have printed the balance of these booklets (95,000, I think), and not to exceed the price fixed in the contract; in other words, the difference between the price fixed in the contract and what it would cost it to have carried it out."

Exception was taken to the charge upon the measure of damages and is assigned as error here. The majority of the court are of opinion that the charge as concretely applied in the quoted part is prejudicial to defendant. The evidence clearly shows that it cost plaintiff very much more than the contract price to furnish 5,000 booklets delivered, and the court's instructions are that this cost would be recovered, plus the net profits upon the 95,000 not furnished. This is wrong. It is true that where a contract is repudiated after one of the parties has been to an expense in part performance or in preparing for performance, such expense can be recovered, also the net profits, if any are proven. *United States v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. ed. 168; *Swanson v. Andrus*, 83 Minn. 505, 86 N. W. 465. But care must be used to make clear to the jury that, in determining the profits for which a recovery is to be allowed, the expenditures made must be added to the further expenditures that would have been necessary in order to have fully completed the whole contract, and that unless the sum total be less than the contract price damages for profits are eliminated. From the instruction the jury were given to understand that in figuring profits they need only consider the cost of producing the 95,000 not furnished. But, manifestly, the loss in producing the first 5,000, which was more than \$400, should enter into and affect the profits on the balance of the contract. A recovery cannot be allowed for the part performed of a repudiated contract at actual cost and also, at the same time, for the net profits of the unperformed part.

There is no need of again trying the issues in the case other than the one of damages. The order of the court below is reversed insofar only as it approved the damages awarded by the verdict; and the cause is remanded for retrial of the issue of the amount of the damages to which plaintiff is entitled.

To the extent indicated a new trial is granted.



# INDEX

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## ABANDONMENT.

Of Homestead. See Homestead, 4, 5.

By Lessee. See Landlord and Tenant, 2, 3.

## ACCORD AND SATISFACTION.

Cashing Check in Full Payment.

1. Receiving and cashing a check, which shows on its face that it is to be accepted as full payment of a disputed claim or returned, operates as an accord and satisfaction of the claim.

—Beck Electric Construction Co. v. National Contracting Co. 190.

2. The payee of a check, reading "pay to William Hart, or order, in payment of contract in full for painting," so much money, "if not correct, return, without alteration, stating differences," drew a pen line through the words "in full," indorsed and cashed it. The first information he gave that he made any further claim was when he interposed an answer in this action to enforce a mechanic's lien. Held: The effect of cashing the check is not changed by erasing the words "in full," without the knowledge or consent of the drawer of the check, as it must be accepted as tendered or rejected.

—Beck Electric Construction Co. v. National Contracting Co. 190.

## ACCOUNTING. See Frauds (Statute of) 3.

## ACCOUNT STATED.

On August 1 plaintiff company wrote a letter to defendant, stating therein the balance due it from defendant company, as shown by the books, and asked it to confirm the account if found correct. Thereupon the manager, and treasurer, and the bookkeeper of defendant examined its books, and after doing so signed and confirmed the account as stated in the letter. Held: The evidence justified the finding that there was an account stated between plaintiff and defendant, and for judgment as ordered.

—Standard Grain Co. v. Middlewest Grain Co. 11, 12.

**ADMIRALTY.**

1. One employed by a shipper of pulpwood to load it on a vessel while moored on navigable waters at a dock in a port in this state, to be transported to a port in another state, is engaged in work of a maritime nature, and, if injured while so employed, does not come within the scope of the Workmen's Compensation Law of this state.

—Soderstrom v. Curry & Whyte, Inc. 154.

2. One thus employed, if injured by reason of the actionable negligence of his employer, is not limited to the relief to which seamen are entitled under the rules of admiralty, but may recover the full damages to which he would be entitled at common law.

—Soderstrom v. Curry & Whyte, Inc. 154.

3. The reasons for the limited liability rule given by Judge Story in *Harden v. Gordon*, 2 Mason, 541, 11 Fed. Cas. 6047, do not apply to men living on shore and employed at ports where ships receive and discharge their cargoes and undergo repairs.

—Soderstrom v. Curry & Whyte, Inc. 157.

4. The amendment to the Federal Judicial Code of October 6, 1917, which extends the rights and remedies afforded by the Workmen's Compensation Laws of the several states to persons injured while employed in work of a maritime nature, will not be given a retroactive effect.

—Soderstrom v. Curry & Whyte, Inc. 154.

**ADVERSE CLAIM.**

To Homestead from Deed of Intestate Husband. See *Homestead*, 3.

**ADVERSE POSSESSION.****Hostile and Exclusive Possession.**

1. Decedent conveyed land which included his homestead to a woman who was living with him as his wife, although he had a wife living, and after the conveyance they continued to live together on the land as husband and wife. Held: Up to the time of his death, her possession was neither hostile nor exclusive.

—Rux v. Adam, 39.

**Evidence.**

2. Decedent conveyed 120 acres to defendant, who was living with him as his wife, and was in possession of the land. Decedent's widow, whom he had deserted 20 years before his death, brought an action of ejectment as to the 80 acres which she claimed constituted his

**ADVERSE POSSESSION—Continued.**

statutory homestead. Held: The evidence falls short of establishing defendant's claim of title to the land in controversy by adverse possession.

—Rux v. Adam, 36.

**ALTERATION OF INSTRUMENT.**

Erasure of Words "In Full" from Face of Check. See Accord and Satisfaction, 2.

**ANTENUPTIAL CONTRACT. See Husband and Wife, 1-3.**

**APPEAL AND ERROR.**

Certification of Case to Supreme Court Unauthorized by Statute. See Certified Case.

Procedure on Appeal from Assessment of Damages for Condemnation of Land May Be Fixed by Court. See Eminent Domain, 9.

Trial of Appeal from County Board in Matter of Consolidation of School Districts. See School and School District, 3.

Review on Appeal from Action of County Board in Detaching Territory from School District. See School and School District, 4, 5.

When Appeal Can Be Taken.

Order Granting Motion to Make Allegations More Definite. See Corporation, 1(1).

1. Section 7828, G. S. 1913, to the effect that the court shall not presume that an order granting a new trial which is silent as to the ground thereof, was granted on the ground that the verdict was not justified by the evidence, was intended to abolish a rule of the court which permitted such presumption. It can have no effect in determining the appealable character of the order.

—Faribault Packing & Produce Co. v. Storlie, 486.

When Appeal Cannot Be Taken. See Appeal and Error, 9.

2. An appeal from findings of fact and conclusions of law was dismissed, because no motion for a new trial and no judgment entered.

—Wildung v. Security Mortgage Co. of America, 478.

Record.

Defective Proof of Service of Notice of Appeal from Municipal Court. See Court.

Notice of Appeal.

3. Written admission of service of notice of appeal from a municipal court to a district court "by mailing" by respondent's attorney is not personal service, as required by statute. G. S. 1913, § 280.

—Santala v. Hill, 290.



**APPEAL AND ERROR—Continued.**

**Where No Exception to Ruling in Record.**

4. The technical objection to the refusal of the court to strike the case from the calendar will not be considered where the record shows no exception to the ruling and no error assigned thereon in the motion for a new trial.

—First National Bank, Northfield v. Coon, 262.

**Testimony in the Record Read to Jury.**

5. There was no prejudicial error in allowing the testimony of a witness on a former trial to be read, when it was proved the witness was no longer within the jurisdiction of the court.

—Farrar v. Locomotive Engineers Mutual Life & Accident Insurance Assn. 468.

**No Review of Objection to Question.**

6. The propriety of sustaining an objection to a question asked a witness cannot be considered on appeal, if there is no showing as to what testimony the witness would give.

—Muenkel v. Muenkel, 29.

**No Reversal for Exclusion of Answer, When.**

7. This court will never reverse a case for rejection of an answer to a question unless it is made to appear that the answer would be material and favorable to the appellant.

—Germain v. Great Northern Lumber Co. 311.

**Review of Evidence. See Appeal and Error, 14, 16.**

**Evidence Not Presented for Review.**

8. Action on an insurance contract. Appeal by defendant. As the bills of exception did not contain the evidence on the issue of fraud, the ruling withdrawing that issue from the jury is not presented for review.

—Aaberg v. Minnesota Commercial Men's Assn. 357.

**Assignment of Error. See Trial, 3.**

**Dismissal of Appeal. See Appeal and Error, 2.**

9. Motion for new trial on the grounds (1) that the verdict was not justified by the evidence; and (2) errors in law, was granted, but the order was silent on the grounds therefor. Appeal from the order, and motion to dismiss the appeal granted on the authority of Heide v. Lyons, 128 Minn. 488, 151 N. W. 139.

—Farbault Packing & Produce Co. v. Storlie, 486.

**Order of Receiving Evidence Immaterial.**

10. The order in which evidence is received does not concern this court on appeal.

—McWethy v. Norby, 387.

**APPEAL AND ERROR—Continued.****Review of Findings of Trial Court.**

11. Where the findings are in favor of plaintiff, in considering the question presented on appeal the supreme court must take the view of the evidence most favorable to plaintiff.

—McRae v. Feigh, 247.

**Verdict Supported by Evidence.**

12. The general rule applied in determining whether a verdict is sustained by the evidence, extends to cases where an alleged fact must be established by a preponderance of clear and convincing evidence.

—Rechtzigel v. National Casualty Co. 302.

**Reversal. See Trespass, 6.**

13. The evidence supports the verdict to such an extent that this court is not warranted in setting it aside.

—First National Bank, Northfield v. Coon, 262.

14. The assignments of error as to the rulings of the trial court upon the admissibility of evidence examined, and no reversible error found.

—Standard Grain Co. v. Middlewest Grain Co. 11.

**Harmless Error.**

15. No reversible error is found in the court's refusal to give requested instructions which are neither applicable nor accurate.

—First National Bank, Northfield v. Coon, 262.

16. The rejection of evidence will not warrant a reversal unless its admission might reasonably have resulted in a different verdict. The exclusion of certain evidence in this case was not reversible error.

—Nelson v. Farrish, 368.

**Prejudicial Error. Reference by Trial Judge to Accused's Failure to Testify in His Own Behalf. See Criminal Law, 1, 4, 5.****Affirmance.**

17. Proceeding for confirmation of local assessment for work of curbing, paving, etc. on an abutting street. Objecting railroad company in the trial court claimed the whole of each of its lots was exempt while the city conceded the certain portion of the lots lying between the bluff and the river was exempt. The evidence and the findings of fact clearly indicate a certain definite part of the parcel of land described in the assessment roll was not subject to assessment. The railroad company did not suggest a modification of the order for judgment so as to embrace the land on top of the bluff, and did not move for a new trial. Held: The judgment should be

**APPEAL AND ERROR—Continued.**

affirmed, but without prejudice to the right of the company to apply to the trial court for a modification of the judgment.

—City of St. Paul v. Chicago, Burlington & Quincy Railroad Co. 453.

18. Where the general verdict showed on its face that an unwarranted amount of \$157 was included therein, a new trial was not granted on appeal, but a reduction of the verdict was ordered.

—Berg v. Village of Chisholm, 270.

**Reversal.** See Appeal and Error, 13, 14.

19. The rejection of evidence will not warrant a reversal, unless its admission might reasonably have resulted in a different verdict.

—Nelson v. Farrish, 373.

**Bond with Writ of Error to U. S. Supreme Court.** See Bond.

20. A bond filed by defendant in proceedings by writ of error in review by the Supreme Court of the United States of a judgment of this court affirming a judgment of the district court held to obligate defendant and his surety to pay the judgment so affirmed by this court, upon an affirmance of its judgment by the Federal Supreme Court.

—Stiles v. American Surety Co. 21.

**ARMY AND NAVY.**

**Discouraging Enlistment.** See War, 1, 3-6.

**Violation of Sedition Act of 1917.** See Criminal Law, 6.

**ASSAULT AND BATTERY.****Evidence.**

1. The evidence is sufficient to sustain a verdict for damages for assault.

—Dahlsie v. Hallenberg, 234.

2. The fact that the probate court had appointed a guardian of the person and estate of defendant, a man of 80 years of age, is not conclusive evidence of his inability to entertain malicious intent and the court properly submitted the question of punitive damages to the jury.

—Dahlsie v. Hallenberg, 234.

3. Evidence that during an affray one of defendants started to draw a revolver from his pocket, but did not point it toward any one or make any movement to use it against any one, is not sufficient to sustain a conviction of an assault with a weapon likely to produce grievous bodily harm.

—State v. Rempel, 88.

**ASSIGNMENT.**

Of Beneficiary's Interest in Decedent's Estate. See Taxation, 13.

Of Equitable Title of Vendee in an Executory Contract for the Sale of Land. See Vendor and Purchaser, 3.

Of Contract for Sale of Goods.

1. A contract to sell and deliver goods may be assigned by the person to whom the goods are to be delivered if there is nothing in its terms manifesting the intention of the parties that it shall not be assignable, but the rights arising out of a contract cannot be transferred if they involve a relation of personal confidence, conferring rights intended to be exercised only by him in whom confidence is reposed. Under this rule a contract of sale is assignable if it provides that the seller may require the buyer to pay cash or give satisfactory security before making delivery of the goods.

—Koehler & Hinrichs Mercantile Co. v. Illinois Glass Co. 344.

Of Debt Not Filled.

2. The presumption created by G. S. 1913, § 7017, that an unfilled assignment of a debt is fraudulent as to creditors of the assignor, can be overcome only by facts showing that the assignment was made in good faith and for a valuable consideration, and the burden of proof is with the assignee.

—National Surety Co. v. Winslow, 66.

3. Evidence that the assignor was indebted to the assignee at the time of the assignment in an amount exceeding the assigned debt, with no evidence that the assignment was made and accepted in pro tanto discharge of the debt, or as good faith security for its payment, and no evidence that the assignment was not colorable merely, held insufficient to require the conclusion that the presumption was overcome.

—National Surety Co. v. Winslow, 66.

Recital of Consideration.

4. The recital in the assignment of "value received," though as between the parties prima facie evidence of a valuable consideration, and a sufficient expression thereof to satisfy the statute of frauds, is not evidence against third persons in proof of a consideration in fact, or of the good faith of the transaction, sufficient to overcome the statutory presumption of fraud.

—National Surety Co. v. Winslow, 67.

Discharge of Debt or Additional Security by Assignment.

5. The mere existence of the indebtedness from the assignor to the assignee will not justify the court in assuming that the assignment

**ASSIGNMENT—Continued.**

was made in discharge thereof, or as further security for the payment of the same, or in good faith.

—National Surety Co. v. Winslow, 66.

6. Even though a contract of sale is not assignable, the parties may consent to its assignment or become estopped by their conduct from asserting that it was not assignable.

—Koehler & Hinrichs Mercantile Co. v. Illinois Glass Co. 344.

Form of Judgment in Favor of Assignee. See Bills and Notes, 13.

**ATTORNEY AND CLIENT.**

Same Attorney Can Represent Two Parties in Action in Intervention, When.

1. Where there is no substantial controversy between two of the parties to an action there is no impropriety in the same attorney representing them so long as the parties represented are content.

—Hoidale v. Cooley, 430.

Parties May Settle Action Without Knowledge of Attorney.

2. Parties to an action have a right to settle it in any manner they see fit without the knowledge or consent of their attorneys.

—Wildung v. Security Mortgage Co. of America, 251, 253.

3. In making a settlement, they are required to take notice of the lien rights which are given by the statute to attorneys and, for their own protection, are bound to guard against a possible second liability under the lien, precisely as they would be if the transaction involved mortgaged property.

—Wildung v. Security Mortgage Co. of America, 251, 254.

Lien of Attorney. See Attorney and Client, 3.

4. Subdivision 3 of section 1, chapter 98, p. 122, Laws 1917, relating to notice, has no application to an action for damages for the alleged conversion of plaintiff's property.

—Wildung v. Security Mortgage Co. of America, 251, 254.

5. An attorney's lien attaches only to the amount which is ultimately due his client after adjusting all the cross-demands and equities between the parties to the action. It extends to the clear balance found to be due the client either at the termination of the litigation or in the settlement, if one is made. The right of set-off between the parties to an action is superior to the claims of attorneys under the lien statute.

—Wildung v. Security Mortgage Co. of America, 251.

6. Where there was an express contract between an attorney and his client, fixing the compensation which the former was to receive,

**ATTORNEY AND CLIENT—Continued.**

the amount of his lien for services is properly determined by referring to the contract.

—*Wildung v. Security Mortgage Co. of America*, 251.

Action Against Attorney for Negligence in Conduct of Trial. See Pleading 1.

Recovery of Counsel Fees. See Injunction, 6.

**AUTOMOBILE.**

Purchase of Garage and Business of Another Coupled with the Seller's Agreement Not to Carry on the Same Business within Specified Territory. See Contract, 8-10.

At a Speed of Four or Five Miles Can Be Quickly Stopped. See Evidence, 1.

Husband's Gift of Motor to Wife Valid as against Creditors. See Gift, 1; Husband and Wife, 6.

Title of Car at Time of Attachment against Husband's Property. See Gt. 2.

Action on the Promise of Defendant to Recover the Unpaid Balance of the Price of a Motor Truck. See Contract, 11.

Negligence of Man of Defective Sight and Hearing in Driving through a Crowded City Street. See Municipal Corporation, 10.

Pedestrian Struck by Motor Truck. See Municipal Corporation, 11.

Collision at Grade Crossing. See Railway, 8.

Liability of Head of Family for Injury to Third Persons Caused by Negligence of Member of the Family. See Master and Servant, 6, 7.

Charge to Jury that Plaintiff Was Entitled to the Right of Way at the Time of Collision Not Prejudicial. See Trial, 4.

**BAGGAGE.**

Definition of the Word. See Carrier, 10.

Limitation of Liability of Carrier. See Carrier, 11-15.

**BANK AND BANKING.**

Cashing Check Drawn in Full Payment of Disputed Claim. See Accord and Satisfaction, 1, 2.

Payment of Check Given to Seller Cannot Be Enforced by Him after Rescission of Sale. See Sale, 5.

Sale of Bank Stock.

1. A person buying bank stock has no greater right to rely on the accuracy of the books and reports of the bank than he would have to rely on those of any other corporation whose stock he was buying.

—*Costello v. Sykes*, 110.

**BANK AND BANKING—Continued.**

2. The books of a bank showed that its paid-in capital was intact and that it had a surplus and undivided profits. In fact, its capital had become seriously impaired, and it had no surplus or undivided profits. A stockholder sold part of his stock for a price equal to its book value. Both he and the purchaser believed that the books showed the true state of facts. There was no fraud or deception. Both parties were equally innocent in their mistaken belief. Held, that the purchaser of the stock did not have the right to rescind the contract of sale on the ground that there had been a mutual mistake of fact.

—Costello v. Sykes, 110.

**Sale of National Bank Stock.**

3. Action by the receiver of an insolvent national bank to recover the amount of an assessment against stock standing in the name of defendants' father at the time of his death and at the time of trial. The defense was and the court found that, after the death of their father and mother, and three years before the insolvency of the bank, defendants sold the stock in good faith, in the usual course of business, for a valuable consideration paid by the buyer, to the cashier of the bank, and delivered the certificates of stock, with blank power of attorney on the back authorizing a transfer on the books of the bank, properly signed by the sellers, to the buyer who thereafter kept them in the bank vault with other papers belonging to the bank and the cashier. There was no evidence that defendants were at any time thereafter treated by any officer of the bank as interested therein. Held: The defendants were not liable.

—Keyes v. Myhre, 193.

4. Held, following the rule stated and applied in *Whitney v. Butler*, 118 U. S. 655, 7 Sup. Ct. 47, 30 L. ed. 266, that defendants neglected no duty resting upon them to cause and effect a transfer of stock in the national bank in question, which they had sold in good faith, and that they are not liable for a stock assessment made in insolvency proceedings three years after such sale.

—Keyes v. Myhre, 193.

**Taxation of Holders of National Bank Stock.** See *Taxation*, 1, 3-7.

**Collection of Out-of-Town Check.**

5. Plaintiff's president was an officer in defendant bank. A conversation between him and another officer of defendant, both acting as such, as to a proposed manner of handling Chicago checks, gives rise

**BANK AND BANKING—Continued.**

to neither contract, representation, nor estoppel, so far as plaintiff is concerned.

—Richardson Grain Separator Co. v. East Hennepin State Bank, 421.

6. A check is intended for payment, not for circulation. A collecting bank must forward out-of-town checks for collection within a reasonable time and by a reasonably direct route. The usual commercial route is sufficient. The customary speed of banks similarly situated is all the check holder may expect.

—Richardson Grain Separator Co. v. East Hennepin State Bank, 420.

7. Plaintiff deposited in an outlying bank in Minneapolis a Chicago check for collection. It knew defendant had no Chicago correspondent. Defendant forwarded the check to Chicago through a Mankato bank. When presented for payment the payee bank had closed its doors. Had it been presented a day earlier, it would have been paid. Held: No liability arises from forwarding a check from Minneapolis to Chicago through a bank in Mankato, when it takes no more time than in the way customary with outlying Minneapolis banks.

—Richardson Grain Separator Co. v. East Hennepin State Bank, 420.

**Same—Silence of Negotiable Instruments Act.**

8. Sections 5998, 6005, G. S. 1913 (Negotiable Instruments Act), prescribe the duty of the holder of a check, but not the duty of a collecting bank. The rules applicable in the two cases are not necessarily the same.

—Richardson Grain Separator Co. v. East Hennepin State Bank, 422.

**Contract of Trust Company.**

9. The contract with plaintiff to employ him as manager of defendant's bond department, though entered into by the president and other officers of defendant corporation without authority, was made valid and binding by the subsequent acquiescence of the board of directors, the contracting authority of the corporation, with knowledge of the facts.

—Bacon v. Bankers Trust & Savings Bank, 318.

**BANKRUPTCY.**

Judgment for Fraud Not Affected by Discharge of Bankrupt. See Pleading, 1.



**BANKRUPTCY—Continued.**

**Enforcement of Stockholder's Liability for Bonus Stock by Trustee.**

Whether the liability of the stockholders of a corporation for bonus stock held by them can be enforced by the trustee in bankruptcy, is a Federal question. It is a question of what rights he takes under the bankruptcy act.

—State Bank of Commerce v. Kenney Bank Instrument Co. 238.

**Trustee Cannot Enforce the Liability of Stockholders to Subsequent Creditors for Unpaid Portion of Stock. See Corporation, 4.**

**BASTARD.**

**Acknowledgement of Paternity.**

1. A letter alleged to have been written and signed by deceased, attested by a witness and sent to respondent, is held to be sufficient in form to constitute an acknowledgment of paternity under G. S. 1913, § 7240.

—Anderson v. Oleson, 328.

2. The evidence is sufficient to sustain a finding that the letter was written and sent to respondent and received by her.

—Anderson v. Oleson, 328.

**Proof of Contents of Lost Letter of Paternity by the Testimony of Interested Party. See Witness, 2.**

**Secondary Evidence of Lost Letter of Paternity. See Evidence, 6.**

**BILL OF EXCEPTIONS. See Appeal and Error, 8.**

**BILL OF SALE. See Contract, 11, 13.**

**Buyer Not Entitled to a Bill of Sale, When. See Sale, 6.**

**Refusal of Bill by Vendor of Engine. See Sale, 5.**

**Vendee's Promise in Bill of Sale to Pay Debt of Vendor to Plaintiff. See Evidence, 8.**

**BILLS AND NOTES.**

**Loan to Insane Person on His Note. See Insanity, 1.**

**Failure of Consideration. See Pleading, 6.**

**Negotiation in "Breach of Faith."**

1. A note, given to be used, with the notes of others, only as collateral to a note of the payee, and which is sold and indorsed by the payee before maturity as an original obligation, is negotiated "in breach of faith" and "under such circumstances as amount to a fraud," within the meaning of the Negotiable Instruments Act.

—McWethy v. Norby, 386.

**BILLS AND NOTES—Continued.**

2. The contention that the fraud referred to in G. S. 1913, § 5867, is confined to deception in obtaining the signature and does not go to the fraud or deceit practiced in inducing the signer to accept something in exchange for the instrument, is too narrow and is not sustained.

—First National Bank of Phillips v. Denfeld, 284, 285.

3. An agent of a corporation in which defendant was a stockholder procured from him the note in suit. Defendant claimed that the agent represented and stipulated that it was to be used with the notes of others only as collateral to the note of the corporation and to enable the corporation to float a loan; that stock in double the amount of the notes was to be deposited with a certain person, as trustee, as security; that the corporation proposed to put men to selling the stock at par; that one-half of the proceeds was to be used to repay the money borrowed, 25 per cent of the other half was to go to expense of selling the stock and defendant was to receive back his collateral note, fully discharged, together with \$750 worth of stock for the use of his credit. The corporation, instead of using the note as collateral, sold it to plaintiff without giving its own note. It sold no stock and, after it fell due, plaintiff sued on it, claiming to be a good-faith purchaser for value. Held:

(1) That the note should be negotiated as collateral to the corporation note was a condition to its becoming a binding undertaking, but it was negotiated as an original obligation.

(2) As the corporation could not have maintained an action on the note the title of the purchaser was defective within G. S. 1913, § 5867.

—McWethy v. Norby, 387, 388, 389.

4. A cranberry corporation owned a swamp of 50 acres in Wisconsin, subject to a mortgage of \$12,000 which had been foreclosed. Another corporation, called E. E. Galle & Company, undertook to float \$37,500 worth of the cranberry company's profit-sharing bonds and one of its solicitors induced defendant to buy \$2,000 of the bonds at a premium. E. E. Galle was an officer of both corporations. Defendant executed the note in suit to E. E. Galle & Company in payment for the bonds, and a week later plaintiff claimed to have become the holder of it and of other notes sold and indorsed by the company to plaintiff. The president and cashier of plaintiff were trustees for the bond purchasers. Held: The note was obtained by fraudulently misrepresenting the financial standing of the cranberry company. This made the title of the payee which procured the

**BILLS AND NOTES—Continued.**

instrument defective. Negotiable Instruments Law, G. S. 1913, § 5867.

—First National Bank of Phillips v. Denfeld, 281, 282.

5. The evidence sustains a finding that the note in suit was obtained from defendant by fraud. This being shown it devolved on plaintiff to prove that it was a bona fide holder, in due course, for value, and without notice of the fraud. The jury's finding that plaintiff did not prove itself such holder is sustained.

—First National Bank of Phillips v. Denfeld, 281.

**Good Faith of Holder.**

6. Proof having been made that the note was defective, the burden was upon the plaintiff, an indorsee, to show that he purchased it for value, in good faith, and without notice. There was evidence that plaintiff was a stockholder in the corporation and intimate with its president. He knew the note arose out of a stock-selling transaction and the maker of it a stranger. Yet he took the note without security, other than the indorsement of the corporation, and released the indorser by failure to protest the note. The evidence on this point made a question of fact for the jury. It was not conclusive in plaintiff's favor.

—McWethy v. Norby, 387, 390.

7. In an action on a promissory note by a purchaser before maturity the fact that interest due annually was to his knowledge unpaid for a number of years was a circumstance against his claim of good faith in purchasing; and that with other circumstances mentioned in the opinion sustains the verdict of the jury for the defendant.

—Lumpkin v. Lutgens, 139.

8. A note was taken as collateral, in part, to other notes, then transferred and indorsed by the same payee to plaintiff. At least \$4,100 of the amount realized for the notes transferred was placed to the credit of the payee upon plaintiff's books. There is no evidence that this sum or any part thereof was paid out before plaintiff was informed of the fraud practiced on the maker of the note in suit. Unless paid out before so informed, plaintiff could not be a holder in due course for value.

—First National Bank of Phillips v. Denfeld, 281.

**Unauthorized Assignment of Premium Note after Maturity.**

9. An insurance agent to whom policies were intrusted for delivery to an applicant for insurance on payment of the first premiums in cash, disobeyed instructions, delivered the policies and took the applicant's notes payable to the applicant and indorsed in blank

**BILLS AND NOTES—Continued.**

An assignee of the notes after maturity sued on them. The insurance company claimed the notes as its own, and intervened. Held, it had a right to intervene and the complaint in intervention stated a case.

—Hoidale v. Cooley, 430.

**Evidence.**

10. Plaintiff claimed that the note was given for the purchase price of stock sold defendant. It appeared that, at a time after the note had been negotiated, a certificate of stock had been transmitted by mail to defendant. It was proper to admit an accompanying letter in evidence in explanation of the sending of the stock.

—McWethy v. Norby, 387.

11. It was not error to permit examination of plaintiff as to whether he inquired of the maker before purchasing the note.

McWethy v. Norby, 387.

12. The evidence was not such as to sustain a finding that the consideration of the note was corporate stock purchased by the defendant of the plaintiff; and the court did not err in refusing to submit such question to the jury.

—Merchants National Bank of Detroit v. Coyle, 440.

**Form of Judgment.**

13. The agent being entitled to 70 per cent of the premium represented by the notes, unless other facts are involved, judgment should be for his assignee for 70 per cent. of the amount and for the company for the balance.

—Hoidale v. Cooley, 430.

**BOND.****Supersedeas.**

On a writ of error to review a judgment against defendant, a bond conditioned that he "shall prosecute his said writ of error to effect and answer all costs and damages which may be adjudged if he shall fail to make good his plea," is supersedeas in form and prevented proceedings in the court below. The bond therefore obligated defendant to pay the principal judgment, not merely the costs.

—Stiles v. American Surety Co. 22.

Action on Injunction Bond. See Injunction, 2-6.

**BOY. See Municipal Corporation, 13.**

Not Held to the Same Standard of Care in Self-Protection as is a Man.

See Negligence, 2.

**BRIDGE.****Performance of Contract.**

1. Section 2600, G. S. 1913, relating to the strength of public bridges, does not prevent a bridge builder from recovering the contract price of a bridge which has not been submitted to the test referred to in the statute, but which has supported a weight four times as great as that required by the specifications and three times as great as that required by the statute.

—McClure v. Village of Browns Valley, 339.

2. The evidence required the court to submit to the jury the question of whether there had been a substantial performance of the contract to build the bridge, under the rule that ordinarily the question of substantial performance is one for the jury, and justified the jury in finding that there had been such performance.

—McClure v. Village of Browns Valley, 340.

**Evidence of Value.** See **Evidence**, 10.

**BROKER.****Consideration for Contract.**

1. The relinquishment of plaintiff's claim under the prior contract and his acts under the present contract constitute a valid consideration, and the contract is not void for want of mutuality. Neither is it void for indefiniteness and uncertainty.

—McRae v. Feigh, 241.

**Action for Compensation.** See **Laches**.

2. The findings of the trial court that the owners of a tract of land containing deposits of iron ore employed plaintiff to procure a purchaser who would take an option for a lease on certain prescribed terms, and promised plaintiff as compensation whatever amount he obtained as a royalty over 25 cents per ton; that plaintiff procured a purchaser ready to take an option for a lease at a royalty of 30 cents per ton; that the owners refused to execute this contract solely for the reason that plaintiff claimed the excess royalty of five cents per ton; that thereafter the owners made a new agreement with plaintiff by which, in case the property was leased, plaintiff was to have any excess of royalty over 30 cents per ton, and was to have this excess even if the property was leased by the owners without plaintiff's aid, is sustained by the evidence.

—McRae v. Feigh, 241.

3. The complaint alleged that defendants gave plaintiff the exclusive right to secure a party willing to take an option for a mineral lease.

**BROKER—Continued.**

and if the lease were taken plaintiff should receive whatever he could get for defendants over and above a royalty of 30 cents per ton, and if defendants should themselves option the property during the refusal to plaintiff, that should not affect his right to the said compensation which he should receive as pay for his services. Held: There was not sufficient difference between the contract proved and the contract alleged to constitute a fatal variance.

—*McRae v. Feigh*, 241, 245.

**BY-LAW. See Corporation, 1.**

Of Mutual Benefit Association. See Evidence, 4, 5; Insurance, 1, 2.

**CANCELATION OF INSTRUMENT.**

Defendant cannot complain that the court imposed, as a condition to the annulment of the note and mortgage of plaintiff corporation, the payment to defendant of the amount of certain taxes paid by the president for plaintiff.

—*Gross Iron Ore Co. v. Paulle*, 48.

**CARRIER.****Switching Charges.**

1. A schedule of rates published and filed by a railroad company, providing for the absorption by the company of the switching charges of connecting carriers at the destination of shipments, where, under its schedules of rates theretofore published and filed, the shipper was required to pay such charges, is a change in an existing tariff, and not a "first instance" tariff, within the meaning of chapter 176, p. 225, Laws 1905.

—*National Elevator Co. v. Chicago, Milwaukee & St. Paul Railway Co.* 162.

Mere Filing of Tariffs with the Railroad and Warehouse Commission Not Compliance with Laws 1905, p. 225, c. 176. See Railroad and Warehouse Commission.

**Object of Statute.**

2. The ends sought to be accomplished by Laws 1905, p. 225, c. 176, were, first, to prevent the carrier from charging excessive rates, and, second, to prevent discriminatory rates between different shippers, different localities and different commodities. This is apparent when the act is read as a whole and the conditions which then existed generally are taken into account.

—*National Elevator Co. v. Chicago, Milwaukee & St. Paul Railway Co.* 167.

**CARRIER—Continued.**

3. The contention that because what is now section 4342, G. S. 1913, was re-enacted in Laws 1907, p. 534, c. 377, after the passage of the Hepburn Act of June 29, 1906, our legislature intended to adopt the construction given the Hepburn Act by the Federal Supreme Court, is not sustained. The purpose was plainly to amend it in another respect not material here.

—*Ferris v. Minneapolis & St. Louis Railroad Co.* 94.

**Consent of Commission to Reduction in Tariff Unnecessary.**

4. A change in the tariffs of a railroad company, voluntarily made, reducing rates to all shippers on all commodities, at all stations in this state, becomes effective without obtaining the consent of the Railroad and Warehouse Commission in the manner provided by chapter 176, Laws 1905.

—*National Elevator Co. v. Chicago, Milwaukee & St. Paul Railway Co.* 163.

**Consent of Commission to Reinstatement of Higher Tariff Necessary.**

5. After such a change has been made, the original rate cannot be restored without the consent of the commission after a hearing upon notice, a finding that the reinstatement of such rate will be a fair and reasonable change in rates, and an order or other action on the part of the commission sanctioning the change.

—*National Elevator Co. v. Chicago, Milwaukee & St. Paul Railway Co.* 163.

**Reduction of Rates.**

6. On no possible hypothesis can it be said that a general horizontal reduction of rates may be detrimental to the public, and ought not to be made without the consent of the Railroad and Warehouse Commission as the representative of the public.

—*National Elevator Co. v. Chicago, Milwaukee & St. Paul Railway Co.* 167, 168.

**Discrimination in Rates. See Carrier, 2.****Declared Valuation of Shipment—Recovery by Shipper.**

7. A firm of furriers packed three fur coats of the value of \$1,500 in a box weighing 24 pounds, properly addressed to the consignee at Christina, Montana, and a representative of defendant carrier called for the package and receipted for the same in a blank form receipt book provided for such purpose by defendant. Printed on the inside front cover of the receipt book was a condition that the rate charged was dependent on the actual value of the property, which must be specifically stated by the shipper, and applied only upon property of an actual value not exceeding \$50 for any shipment

**CARRIER—Continued.**

of 100 pounds or less. If the actual value was greater than \$50 for any shipment of 100 pounds or less, such actual value must be specifically stated in writing by the shipper, and excess charges for such greater value must be paid therefor. The shipper's clerk prepared the receipt, but did not fill in the spaces as to the value and contents of the package. The defendant's agent did not inquire about the same and was not informed of the value. The package was then delivered to the defendant's shipping clerk who made out the waybill and indorsed thereon, box of furs, value not given. He looked up the shipping rates, found them to be \$1.29 on the basis of valuation of \$50. Defendant shipped the package to its agency nearest and most convenient to Christina, where there was no express agency; it arrived at the agency and was destroyed by fire before the consignee was notified of its arrival. The furlers' insurer, plaintiff company, paid them the amount of their loss, took an assignment of the claim against defendant, and brought this action. The trial court ordered judgment for \$50. Held; Plaintiff was entitled to recover the full value of the shipment.

—Western Assurance Co. v. Wells, Fargo & Co. 60.

8. Under the Cummins Amendment of August 9, 1916, to the Interstate Commerce Act (U. S. Comp. St. § 8604a), a common carrier of interstate commerce is required to obtain, by order of the Interstate Commerce Commission, the right to adopt alternative rates based on declared values of the shipment, and, the carrier not having done so, the shipper is not restricted, in an action to recover for loss of the shipment, to such declared value.

—Western Assurance Co. v. Wells, Fargo & Co. 60.

9. A prospective operation must be given to clause in Cummins Amendment of August 9, 1916, to Interstate Commerce Act (U. S. Comp. St. 1916, § 8604a), to effect that declared liability of the carrier for actual loss shall not apply to contracts of limitation authorized by order of Interstate Commerce Commission, and that proviso or exception should not be construed to apply to orders made by the Commission prior to the amendment of March 4, 1915.

—Western Assurance Co. v. Wells, Fargo & Co. 60, 66.

**Definition of Baggage.**

10. Baggage means such articles of necessity and convenience as are usually carried by passengers for their personal use. It does not include merchandise held for sale, but, if the carrier knowingly accepts such merchandise as baggage, its liability is the same as in case of other baggage. In this case the evidence sustains the finding of the jury that certain articles of merchandise kept for sale



**CARRIER—Continued.**

were accepted as baggage with notice of their character and use. the agent having seen plaintiff's grip opened and that it contained merchandise.

—*Ferris v. Minneapolis & St. Louis Railroad Co.* 90, 91.

**Limitation of Liability for Baggage of Passenger.**

11. The limitation of the amount of the carrier's liability for loss is a matter of contract. A limitation in a schedule of rates published and filed as required by statute is not effective for the purpose if not assented to by the shipper.

—*Ferris v. Minneapolis & St. Louis Railroad Co.* 91.

12. A limitation on the baggage check does not limit the carrier's liability unless assented to by the passenger and there is a contract fairly and honestly entered into establishing the limitation. A baggage check is not ordinarily a contract of carriage. It is merely a receipt.

—*Ferris v. Minneapolis & St. Louis Railroad Co.* 91, 94.

13. The rule properly deducible from the Minnesota decisions is that contracts limiting liability are in derogation of the common law and are not favored, that the burden is on the carrier to prove not merely a contract in form but a contract made understandingly. This is the generally accepted rule.

—*Ferris v. Minneapolis & St. Louis Railroad Co.* 95.

14. The burden of proof is upon the carrier to prove that such a contract was fairly and honestly made, and an instruction to that effect is correct.

—*Ferris v. Minneapolis & St. Louis Railroad Co.* 91.

15. An instruction that if the nature of the contents of plaintiff's grip and the use she proposed to make of them were known to defendant's agent at the time he accepted the grip as baggage and issued a baggage check therefor, defendant was liable for the full value of its contents, was correct.

—*Ferris v. Minneapolis & St. Louis Railroad Co.* 92.

**CASES DISTINGUISHED.**

*Ashton v. Thompson*, 32 Minn. 25, 18 N. W. 913.

—*Malchow v. Malchow*, 53.

*Baylor v. Butterfass*, 82 Minn. 21, 84 N. W. 640.

—*National Surety Co. v. Winslow*, 73.

*Baxter v. Covenant Mut. Life Assn.* 81 Minn. 1, 2, 83 N. W. 459.

—*Amy v. Wallace-Robinson Lumber Co.* 429.

*Fischer v. Sperl*, 94 Minn. 421, 103 N. W. 502.

—*Malchow v. Malchow*, 53.

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- Gorgenson v. Great Northern Ry. Co. 138 Minn. 267, 164 N. W. 904.  
 —Amy v. Wallace-Robinson Lumber Co. 429.  
 Lawler v. Minneapolis, St. P. & S. S. M. Ry. Co. 129 Minn. 506, 152 N. W. 882.  
 —Gowan v. McAdoo, 232.  
 Mackall v. Pocock, 136 Minn. 8, 161 N. W. 228.  
 —State Bank of Commerce v. Kenney Band Instrument Co. 240.  
 Shaw v. First Baptist Church, 44 Minn. 22, 46 N. W. 146.  
 —Walberg v. Jacobson, 214.  
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 —Malchow v. Malchow, 58.  
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 —Malchow v. Malchow, 58.  
 Sorlien v. Rolla, 126 Minn. 500, 148 N. W. 301.  
 —Coulter v. Meining, 107.  
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 —City of St. Paul v. Chicago, Burlington & Quincy Railroad Co. 452.  
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 —Zinken v. Melrose Granite Co. 400.  
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 —State v. Ludemann, 129.  
 Swenson v. Board of Commissioners of Town of Hallock, 95 Minn. 161, 103 N. W. 895.  
 —Berg v. Township of Rosedale, 426.  
 Thwing v. Hall & Ducey L. Co. 40 Minn. 184, 46 N. W. 815.  
 —Costello v. Sykes, 112, 113.  
 Warren v. First Division St. P. & Pac. R. Co. 21 Minn. 424.  
 —Ford Motor Co. v. City of Minneapolis, 395.  
 Way v. Barney, 116 Minn. 285, 133 N. W. 801.  
 —State Bank of Commerce v. Kenney Band Instrument Co. 240.  
 Zenner v. Great Northern Ry. Co. 135 Minn. 37, 159 N. W. 1087.  
 —Gowan v. McAdoo, 232.

**CASES FOLLOWED.**

- Boeing v. Owsley, 122 Minn. 190, 142 N. W. 129.  
 —State v. Cavour Mining Co. 273.  
 City of Minneapolis v. Wilkin, 30 Minn. 145, 15 N. W. 668.  
 —Ford Motor Co. v. City of Minneapolis, 394, 395.  
 Dechter v. National Council K. & L. of S. 130 Minn. 329, 153 N. W. 742.  
 —Rechtzigel v. National Casualty Co. 306.

**CASES FOLLOWED—Continued.**

- Diocese of St. Paul v. City of St. Paul, 138 Minn. 67, 163 N. W. 978.  
—Little v. Universalist Convention, 302.
- Dyer v. City of St. Paul, 27 Minn. 457, 8 N. W. 272.  
—Berg v. Village of Chisholm, 269.
- First Nat. Bank of Hastings v. Corp. Securities Co. 128 Minn. 341, 150 N. W. 1084.  
—Koehler & Hinrichs Mercantile Co. v. Illinois Glass Co. 347.
- Gowan v. McAdoo, 143 Minn. 227, 173 N. W. 440.  
—Gowan v. McAdoo, 481.
- Gregory Co. v. Shapiro, 125 Minn. 81, 145 N. W. 791.  
—Koehler & Hinrichs Mercantile Co. v. Illinois Glass Co. 347.
- Gridley v. Northern Pacific Ry. Co. 111 Minn. 281, 126 N. W. 897.  
—Stavanau v. Gray, 4.
- Guliford v. Western Union Tel. Co. 59 Minn. 332, 61 N. W. 324.  
—Baer v. Waseca Milling Co. 486.
- Hage v. Benner, 111 Minn. 365, 127 N. W. 3.  
—First National Bank, Northfield v. Coon, 265.
- Hale v. Life I. & I. Co. 65 Minn. 548, 68 N. W. 182.  
—Farrar v. Locomotive Engineers Mutual Life & Accident Assn. 474.
- Hammel v. Feigh, 143 Minn. 116, 173 N. W. 570.  
—Johnson v. Brastad, 336.
- Heide v. Lyons, 128 Minn. 488, 151 N. W. 139.  
—Faribault Packing & Produce Co. v. Storlie, 486, 487.
- Hulett v. Carey, 66 Minn. 327, 334, 69 N. W. 31.  
—Anderson v. Oleson, 330, 331.
- Jensen v. Fischer, 134 Minn. 366, 159 N. W. 827.  
—Johnson v. Smith, 352.
- Johnson v. Evans, 141 Minn. 356, 170 N. W. 220.  
—Johnson v. Smith, 352.
- Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091.  
—Johnson v. Smith, 252.
- Lavalle v. Northern Pacific Ry. Co. 143 Minn. 74, 172 N. W. 918.  
—Gowan v. McAdoo, 228, 234.
- Leber v. Minneapolis & N. W. Ry. Co. 29 Minn. 266, 13 N. W. 31.  
—Ford Motor Co. v. City of Minneapolis, 394.
- Leeds v. Little, 42 Minn. 414, 44 N. W. 309.  
—McClure v. Village of Brown's Valley, 343.
- Livingston v. Ives, 35 Minn. 55, 62, 27 N. W. 74.  
—Anderson v. Oleson, 330.
- Lobdill v. Laboring Men's Mutual Aid Assn. 69 Minn. 14, 71 N. W. 696.  
—Aaberg v. Minnesota Commercial Men's Assn. 361.

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- Lovering v. Webb Publishing Co. 108 Minn. 201, 120 N. W. 688.  
—Baer v. Waseca Milling Co. 485.
- McDonald v. City of St. Paul, 82 Minn. 308, 84 N. W. 1022.  
—Palm v. City of Minneapolis, 477.
- Maroney v. Minneapolis & St. L. R. Co. 123 Minn. 480, 144 N. W. 149.  
—Rechtzigel v. National Casualty Co. 306.
- Miller v. Maier, 136 Minn. 231, 161 N. W. 513.  
—Exrieder v. O'Keefe, 280.
- Morgan v. City of Albert Lea, 129 Minn. 59, 151 N. W. 532.  
—Berg v. Village of Chisholm, 269.
- Murphy v. Anderson, 128 Minn. 106, 150 N. W. 387.  
—Koehler & Hinrichs Mercantile Co. v. Illinois Glass Co. 347.
- Newton v. Newton, 46 Minn. 33, 37, 48 N. W. 450.  
—Anderson v. Oleson, 330.
- Nielsen v. City of Albert Lea, 87 Minn. 285, 91 N. W. 1113.  
—Pelkey v. National Surety Co. 178.
- Odenbreit v. Uthelm, 131 Minn. 56, 154 N. W. 741.  
—Rux v. Adam, 39.
- Olson v. City of Albert Lea, 107 Minn. 127, 119 N. W. 794.  
—Berg v. Village of Chisholm, 269.
- Owsley v. Johnson, 95 Minn. 168, 103 N. W. 903.  
—Stavanau v. Gray, 4.
- Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745.  
—Johnson v. Smith, 352.
- Ritko v. Grove, 102 Minn. 312, 113 N. W. 629.  
—Otterstetter v. Steenerson Bros. Lumber Co. 444.
- Sallden v. City of Little Falls, 102 Minn. 358, 113 N. W. 884.  
—Berg v. Village of Chisholm, 269.
- Schweigert v. Abbott, 122 Minn. 385, 391, 142 N. W. 723.  
—Independent School District No. 47 v. Meeker County, 477.
- Scott v. T. W. Stevenson Co. 130 Minn. 151, 133 N. W. 316.  
—Koehler & Hinrichs Mercantile Co. v. Illinois Glass Co. 347.
- Skillings v. Allen, 143 Minn. 323, 173 N. W. 663.  
—Skillings v. Allen, 483.
- Staples v. O'Neal, 64 Minn. 27, 65 N. W. 1063.  
—Koehler & Hinrichs Mercantile Co. v. Illinois Glass Co. 347.
- State v. District Court, 142 Minn. 335, 172 N. W. 183.  
—State ex rel. v. District Court, 146.
- State v. Evans, 99 Minn. 220, 108 N. W. 953.  
—State v. Cavour Mining Co. 273.
- State v. Gilbert, 141 Minn. 263, 169 N. W. 790.  
—State v. Randall, 203, 205.

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- State v. Holm, 139 Minn. 267, 166 N. W. 181.  
—State v. Randall, 205.  
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—State v. Randall, 205.  
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—State v. Irwin, 488.  
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—State ex rel. v. District Court, 146.  
Steenerson v. Great Northern Ry. Co. 60 Minn. 461, 62 N. W. 826.  
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—Berg v. Village of Chisholm, 269.  
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—Ford Motor Co. v. City of Minneapolis, 395.  
Zeitler v. National Casualty Co. 124 Minn. 478, 145 N. W. 395.  
—Rechtzigel v. National Casualty Co. 306, 307.

**CASE LIMITED.**

- Pederson v. Christofferson, 97 Minn. 491, 502, 106 N. W. 958, 962.  
—Anderson v. Oleson, 330.

**CASE OVERRULED.**

- Lindstrom v. Mutual Steamship Co. 132 Minn. 328, 156 N. W. 668.  
—Soderstrom v. Curry & Whyte, Inc. 156.

**CASE QUESTIONED.**

- First Nat. Bank v. Slette, 67 Minn. 425, 69 N. W. 1148.  
—Lumpkin v. Lutgens, 141.

**CEMETERY. See Perpetuities; Will.**

Respondent religious corporation is authorized to acquire burial grounds by devise. G. S. 1913, § 6600. While perhaps what are commonly

**CEMETERY—Continued.**

known as denominational or church cemeteries are thereby referred to, it does not exclude the family burial plot that a person might desire to confide to his church organization.

—Little v. Universalist Convention of Minnesota, 302.

**CERTIFIED CASE.****Certification Unauthorized by Statute.**

Motion to quash an indictment and for the discharge of defendant, on the ground that proof of the facts stated by the county attorney in his opening address to the jury would not warrant a conviction of violation of the statute on which the indictment was founded. The trial court discharged the jury and certified the cause to the supreme court. The certification of the cause was dismissed. **Held:** (1) The facts do not bring the case within the statute providing for such review. G. S. 1913, § 9251. The question does not arise upon a demurrer or special plea to the indictment nor has there been a conviction thereunder.

(2) The trial court has not decided the question presented by the motion, an essential prerequisite.

(3) The question raised by a motion at the trial challenging the sufficiency of the indictment, or the sufficiency of the evidence to justify a verdict of guilty, can be certified to the supreme court only after defendant has been convicted.

—State v. Wellman, 488.

**CERTIORARI. See Costs.****CHATTEL MORTGAGE. See Judgment, 3; Trover and Conversion.**

1. Where the giving of the mortgage is admitted, a statement by the mortgagor that the mortgagee had no mortgage or no claim on the mortgaged property is not sufficient to prove the nonexistence of the mortgage or its discharge.

—Bogstad v. Anderson, 336.

2. Where a purchaser at a chattel mortgage foreclosure sale sues to recover the consideration paid on the theory that the mortgage was discharged before foreclosure, the burden is upon him to prove such discharge.

—Bogstad v. Anderson, 336.

**Foreclosure. See Vendor and Purchaser, 5.**

3. There is no warranty of title on a foreclosure sale, but there is a warranty or representation by the mortgagee that he has a subsisting mortgage on the property sold.

—Bogstad v. Anderson, 336.

**CITY OF GRANITE FALLS.** See School and School District, 2.

**CITY OF MINNEAPOLIS.** See Eminent Domain, 7-9.

**CITY OF PIPESTONE.** See Pleading, 4.

**CITY OF ST. PAUL.** See Municipal Corporation, 5-8.

**CLASSIFICATION.** See Constitution.

**COLLATERAL ATTACK.**

On Final Decree of Probate Court that Land Constituted Intestate's Statutory Homestead. See Homestead, 3.

Order of County Board Establishing a County Ditch and the Assessments for Benefits and Damages Not Subject to Attack. See Drain, 5.

**COLLATERAL SECURITY.** See Bills and Notes, 1, 3.

Fraud in the Negotiation of a Promissory Note. See Bills and Notes, 2.

**COMMERCE.**

Alternative Rates Based on Declared Value of Shipment in Interstate Commerce. See Carrier, 8.

1. A sale of tile to be shipped from Illinois and Iowa, and delivered on board cars in Minnesota, was a transaction in interstate commerce.

—American Brick & Tile Co. v. Turnell, 96.

2. Plaintiff manufactured tile in Iowa and shipped it to purchasers in Minnesota. The finding of the trial court that plaintiff's transactions were transactions in interstate commerce, and that none of them constituted the doing of business in Minnesota in violation of the statutes of Minnesota, is not overcome by the fact that plaintiff made bids and contracts in Minnesota for furnishing tile for county and judicial ditches and had representatives in Minnesota soliciting such contracts, nor by the fact that plaintiff as a matter of accommodation furnished a contractor with a certified check to file with his bid for constructing a ditch, nor by the fact that plaintiff procured an assignment of money due or to become due under a ditching contract as security for the unpaid purchase price of tile sold the contractor.

—American Brick & Tile Co. v. Turnell, 96.

**Action by Unlicensed Foreign Corporation.**

3. A foreign corporation not licensed to do business in this state may

**COMMERCE—Continued.**

maintain an action in the courts of this state to enforce payment for goods sold in interstate commerce to residents of this state.

—American Brick & Tile Co. v. Turnell, 96.

**COMPROMISE AND SETTLEMENT.**

Parties to an Action May Settle It without the Knowledge of Their Attorneys. See Attorney and Client, 2.

Full Release Printed on Face of Check Given in Settlement. See Release, 1.

**CONDITION.**

Precedent. See Bills and Notes, 3(1); Vendor and Purchaser, 2.

To Action on Insurance Policy. See Insurance, 10.

**CONSTITUTION.**

When Act Is Void because Containing More than One Subject. See Statute, 4.

Special Legislation. See Statute, 1, 3.

Power to Classify.

1. The power to classify is legislative and the courts will not declare a classification void unless it is manifestly arbitrary.

—State ex rel. v. Independent School District of Granite Falls, 433.

Right of Prisoner to Trial by Jury May Be Waived. See Criminal Law, 3.  
Due Process of Law. See Injunction, 3.

2. The holding that a lessee under a state mining lease, taking low grade ore from the mine in the manner of ordinary good mining, must pay on the tonnage of the product, although under present furnace methods it is not directly usable in the furnaces, and not on the reduced tonnage of concentrates resulting from such product after it is taken to the washer and there treated or "beneficiated," does not offend the contract or due process provisions of the Federal Constitution.

—State v. Hobart Iron Co. 457.

Personal Service of Notice in Assessment and Levy of Taxes Not Essential. See Taxation, 7.

**CONTRACT.**

Contract by City Unauthorized. See Municipal Corporation, 1-4.

Express Contract between an Attorney and Client for Compensation Fixes the Amount of the Attorney's Lien. See Attorney and Client, 6.

Limitation of Liability of Carrier for Baggage of Passenger. See Carrier, 7, 9, 11-15.



**CONTRACT—Continued.**

**Antenuptial Contract.** See Husband and Wife, 1-3.

**Of Employment.** See Bank and Banking, 9; Physician and Surgeon, 2.  
**Want of Mutuality of Obligation.** See Broker, 1.

1. The parties to an executory contract for the sale of goods may recognize its binding effect by their conduct, so that it is no longer open to question on the ground that it lacks mutuality.

—Koehler & Hinrichs Mercantile Co. v. Illinois Glass Co. 344.

**Mutual Concurrent Promises.** See Contract, 3.

**Indefiniteness.** See Broker, 1.

**Consideration.** See Broker, 1.

**Recital in an Assignment of "Value Received" Not Evidence of a Consideration in Fact.** See Assignment, 4.

2. A promise to pay the antecedent debt of another must be supported by some new consideration. A loan of money by defendant to plaintiff was not a sufficient consideration to support a promise by plaintiff to pay certain debts of her son, which defendant held for collection, it not appearing that defendant had any authority to extend the time of payment of the claims held by him.

—Luing v. Peterson, 6.

3. Mutual concurrent promises incorporated in a bilateral contract furnish a sufficient consideration for each other.

—Koehler & Hinrichs Mercantile Co. v. Illinois Glass Co. 344.

4. If a party holding an option under a contract has bought his option for value paid or absolutely agreed to be paid, he may enforce it. This rule applies to a contract of sale giving to the buyer the privilege of increasing the quantity of goods specified in the contract as much as he may desire during the period covered by the contract.

—Koehler & Hinrichs Mercantile Co. v. Illinois Glass Co. 344.

**Unfair Dealing by Person in Confidential Relation.**

5. There can be no valid contract between two persons except after a full and fair communication and explanation of every material particular within the knowledge of the one who seeks to uphold it against the other, if it appears that the former possessed influence which he abused, or had gained confidence which he betrayed.

—Malchow v. Malchow, 54.

6. In determining the validity of a contract between parties when one stands in a fiduciary relation to the other, inadequacy of consideration is an important factor; but no obligation rests upon a man about to marry to secure his prospective wife a due proportion of all his property, under penalty, if he does not, of having his contract with her decreed prima facie a fraud upon his part.

—Malchow v. Malchow, 54.

**CONTRACT—Continued.**

7. Fraud will be presumed when there has been a transaction between persons occupying a fiduciary relationship, whereby one in whom confidence was reposed, or who possessed controlling influence over the other, obtained benefits without consideration, or for an inadequate consideration. The onus is on a person obtaining such benefits to show that he acted righteously.

—*Malchow v. Malchow*, 53.

Where One Party Is Insane Contract Cannot Be Avoided where the Other Party Was without Knowledge of the Insanity. See *Insanity*, 2.

Ratification. See *Bank and Banking*, 9.

Ratification by City Council. See *Municipal Corporation*, 24.

In Restraint of Trade.

8. A person may legally purchase the business and trade of another to remove or prevent competition, coupled with an undertaking on the part of the seller not to carry on the same business in the same place or within the same territory. The question of the reasonableness of the restraint depends upon whether it is such only as to afford a fair protection to the buyer, and the limits of restraint depend upon the kind of trade or business which is the subject of the contract.

—*Williams v. Thomson*, 455.

9. Where the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between the parties, and not specially injurious to the public, the restraint is reasonable and valid.

—*Williams v. Thomson*, 456.

10. In an action to recover damages for breach of a contract which the parties had entered into, and to restrain the defendant from engaging in the garage business within Blue Earth county for the period of ten years, held, that the contract was not void as being in restraint of trade.

—*Williams v. Thomson*, 454.

To Pay Seller's Debt to Plaintiff.

11. Action on the promise of defendant corporation to recover the unpaid balance on the price of a motor truck. The vendee of the truck had transferred it to defendant by a bill of sale which stated the purchase price was paid by [defendant corporation] in lumber to plaintiff, "the party who sold said truck" to the maker of the bill of sale. The sufficiency of the evidence to establish the promise was not questioned. Held: The court did not err in

**CONTRACT—Continued.**

charging the jury that the verdict, if for the plaintiff, should be for the balance of the purchase price of the truck.

—*Germain v. Great Northern Lumber Co.* 313, 314.

12. There is no pleading that the promise made by the vendee in this case was procured by fraud or under mistake of fact nor is the evidence sufficient to make out such a defense.

—*Germain v. Great Northern Lumber Co.* 312.

13. The measure of recovery is not the consideration stated in the bill of sale but the amount of the debt of plaintiff.

—*Germain v. Great Northern Lumber Co.* 312.

**Construction of Building Contract.**

14. A contract for remodeling a building, by which the contractor agreed to "fix the foundations where necessary," held to impose upon him the obligation to repair the foundation and adjust it to conditions resulting from raising the building from the existing foundation; the raising of the building being one of the contemplated changes the parties had in mind in entering into the contract.

—*Walberg v. Jacobson*, 210.

15. A provision of the contract that in the event extras became necessary to complete the work they should be provided for by written agreement, was not of the essence of the contract, but a detail in the performance, and the requirement of a writing on the subject could be waived.

—*Walberg v. Jacobson*, 211.

**Rescission.** See *Sale*, 1, 2.

**Of Sale of Stock because of Mistake as to Book Value of Bank Stock.**  
See *Bank and Banking*, 2.

**Performance.** See *Drain*, 7.

**Substantial Performance.** **Strength of Bridge.** See *Bridge*, 1, 2.

**Breach Of Contract of Employment.** See *Master and Servant*, 1.

**Recovery Of Expense Incurred In Part Performance.** See *Damages*, 3.

**Evidence of Custom as to Notice of Breach Admissible.** See *Contract*, 17.

16. Action for breach of printing contract. One hundred thousand copies were ordered. Five thousand had been delivered when defendant repudiated the contract. Defense was lack of authority of agent of defendant to give the written order. The complaint claimed as damages (1) the amount expended in carrying out the contract up to the time it was repudiated; (2) the net profit on the job. Verdict for \$1,000. Held:

(1) Whether the agent had such authority and whether there had been ratification of his acts, were proper questions for the jury.

(2) If in one respect there was an inadvertent misstatement of the

**CONTRACT—Continued.**

evidence in the charge to the jury, it should have been called to the attention of the trial judge at the time.

(3) The charge to the jury was prejudicial to defendant. The loss on the 5,000 copies furnished was \$400. Recovery cannot be allowed on the actual cost of the part performed and also on the net profits of the unperformed part.

—Periodical Press Co. v. Sherman-Elliott Co. 489.

**Custom of Trade.**

17. The custom of the feed trade entered into the terms of a contract to ship bran. Evidence of the custom as to notice of breach of contract was admissible.

—McDonald v. Union Hay Co. 41.

**CORPORATION.**

Religious Corporation Authorized to Acquire Burial Ground by Devise.  
See Cemetery.

Taxation of Stockholders upon Their Stock. See Taxation, 2.

Taxation of Holders of National Bank Stock. See Taxation, 1, 3-7.

Certificate of Stock. See Bank and Banking, 3; Bills and Notes, 10.

Transfer of Stock. See Estoppel.

Transferee of Stock Not Presumed to Have Knowledge of the Corporation By-Laws. See Corporation, 1(3).

Mistake in Sale of Bank Stock. See Bank and Banking, 1, 2.

No Greater Right of Parties to Rely on the Reports of Banks than on the Books of Any Corporation. See Bank and Banking, 1, 2.

Transfer of Stock in National Bank. See Bank and Banking, 3, 4.

Transfer of Stock in Foreign Corporation.

1. Action to compel a South Dakota corporation, authorized to do business in Minnesota, to transfer on its books certain shares of its capital stock which plaintiff bought of the person to whom they were issued. The answer alleged as one defense that the court had no jurisdiction of the subject matter, and as another defense that plaintiff's assignor had never paid for the stock, and by virtue of the South Dakota statute and the by-laws adopted pursuant thereto, defendant had a lien on all the stock until it was paid for in full, and no stock could be transferred on the books until it had been paid for in full and all liens satisfied. The trial court granted plaintiff's motion to make this allegation more definite and certain and to set out the by-laws referred to in full and the date of their passage, and defendant was allowed ten days in which to amend its answer and set out the by-law and the date of its passage. From this order defendant appealed. Held:

**CORPORATION—Continued.**

(1) While the order did not specify what would be done in case it was not obeyed, such disobedience would be sufficient ground for the court to strike the indefinite allegations from the answer or bar defendant from introducing testimony in support of them. As that would involve the merits of the action, the order is appealable within the doctrine of *Lovering v. Webb Publishing Co.* 108 Minn. 201, 120 N. W. 638. Motion to dismiss appeal denied.

(2) If it is necessary to plead the existence of the by-law, there was no abuse of discretion in requiring defendant to set forth its substance and date of its adoption.

(3) It cannot be presumed a transferee of stock in a corporation has knowledge of the corporation by-laws.

(4) The relief asked does not involve the exercise of visitatorial powers or management of the internal affairs of the corporation. It merely involves whether a citizen of Minnesota, who has bought stock from one to whom the corporation issued it, is entitled to have it transferred on the books of a foreign corporation duly licensed to do business in Minnesota.

(5) If there is any amount due the corporation from the seller of the stock for which it has a lien, the Minnesota courts can protect and enforce the same as against the holder of the stock.

—*Baer v. Waseca Milling Co.* 483.

**Liability of Stockholder to Subsequent Creditors for Stock Not Paid for in Full.**

2. Stockholders receiving stock partly bonus, because issued to them fully paid in return for greatly overvalued property, will be compelled to pay the difference between the value of what they gave and the par of the stock received, if such difference is required to pay the claims of subsequent creditors who have actually or presumably relied upon the stock as fully paid. This liability of the stockholders is founded upon fraud.

—*State Bank of Commerce v. Kenney Band Instrument Co.* 236.

**Authority of Officer to Execute Mortgage.**

3. Plaintiff's president procured a loan from defendant and gave the note of the corporation and a mortgage on land of the corporation as security. The loan was in fact procured for the personal use of the president and was received by him and so used. Evidence that the president told defendant he needed money, and the money was paid by check to the personal order of the president, is sufficient to sustain a finding that defendant had notice of the purpose for which the loan was procured.

—*Gross Iron Ore Co. v. Paulte*, 48.

**CORPORATION—Continued.**

**Assessment of Stockholder in Insolvent National Bank.** See **Bank and Banking**, 3.

4. Subsequent creditors can enforce this liability, when otherwise entitled to do so, though the corporation is in bankruptcy and a trustee is appointed; for the liability of the stockholder is not a corporate asset which the trustee takes from the bankrupt, nor is it a liability which he may assert as a representative of creditors.

—**State Bank of Commerce v. Kenney Band Instrument Co.** 236.

**Enforcement of Liability of Stockholder for Bonus Stock by Trustee in Bankruptcy.** See **Bankruptcy**.

**Foreign Corporation. Action to Compel Transfer of Stock to Purchaser.** See **Corporation**, 1.

**Unlicensed Corporation May Maintain Action in Minnesota Courts to Enforce Payment of Goods Sold in Interstate Commerce to Residents of This State.** See **Commerce**, 3.

**CORRUPT PRACTICES ACT.** See **Election**, 4.**COSTS.**

**Against County Board.**

**Motion to set aside judgment for costs against defendant county entered without notice.** Held: The county board did not subject themselves or the county to costs by granting the petition to form a school district, nor could petitioners or the consolidated school district by certiorari or by appeal subject the county to a judgment for costs. After the petitioners appealed to the district court, the county attorney had no authority to answer in its behalf. The motion should be granted on the authority of **Schweigert v. Abbott**, 122 Minn. 385, 391, 142 N. W. 723.

—**Independent School District No. 47 of Meeker County v. Meeker County**, 475.

**COUNTY AND COUNTY OFFICER.**

**County Attorney. Without Authority to Answer for County Board in Proceedings for Formation of School District, after the Petitioners Had Appealed to the District Court.** See **Costs**.

**County Auditor. Writ of Mandamus to Procure Certificate of Election.** See **Election**, 1.

**County Board.** See **School and School District**, 3.

**Injunction to Restrain Obstruction of Swale by Embankment.** See **Injunction**, 1.

**Order Establishing County Ditch Not Subject to Collateral Attack.** See

**COUNTY AND COUNTY OFFICER—Continued.**

**Drain, 5.**

**Estoppel of County Board in the Matter of Consolidation of School Districts.** See *School and School District*, 1.

**Testimony of Members as to Their Reason for Vote in Favor of Detaching Territory from School District.** See *School and School District*, 4, 5.

**COURT.**

**Municipal Court. Written Admission of Service of Notice of Appeal to Municipal Court "by Mailing."** See *Appeal and Error*, 3.

**Appeal from Municipal Court.**

The appeal from the municipal court to the district court was rightly dismissed because the proof of service of the notice of appeal failed to show a valid service of that notice.

—*Santala v. Hill*, 289.

**Probate Court. Jurisdiction to Determine Boundaries of Homestead.** See *Homestead*, 3.

**Without Jurisdiction to Determine Adverse Claims to Homestead under Husband's Deed.** See *Homestead*, 3.

**Final Decree in Will Contest Relates Back to the Date of Death.** See *Taxation*, 15.

**CRIMINAL LAW.**

**Certification of Case to the Supreme Court Unauthorized by Statute.** See *Certified Case*.

1. Section 8376, G. S. 1913, prohibits a reference by the trial judge to the failure of a defendant in a criminal proceeding to take the witness stand and to testify in support of his defense. It applies to all criminal prosecutions without exception, and a violation thereof is error, though the result of inadvertence and mistake.

—*State v. Richman*, 317.

2. It was not reversible error to instruct the jury that when a law is a new one and subject to misinterpretation that is not a defense.

—*State v. Whipple*, 408.

**Assault with a Dangerous Weapon.** See *Assault and Battery*, 3.  
**Drunkenness.**

3. Conviction by justice of the peace, after plea of not guilty, without trial by jury, and commitment to the common jail, do not warrant the prisoner's discharge from custody on habeas corpus, as the constitutional right to trial by jury may be waived.

—*State ex rel. v. Carver*, 27.

**CRIMINAL LAW—Continued.****Larceny.**

4. The instructions to the jury in a prosecution for grand larceny to the effect that, if the jury found from the evidence that certain money taken from defendant at the time of his arrest was the identical money that had been stolen from complainant, they should consider with the other evidence in the case the failure of defendant to become a witness in his own behalf and explain away such possession, held a violation of section 8376, G. S. 1913, and prejudicial error.

—State v. Richman, 314.

5. The court may, in such case, state to the jury the general rule that the unexplained possession of stolen property is presumptive evidence that the person so in possession stole the same, but cannot, in the face of the statute, go farther and expressly direct the jury to consider the failure of defendant to take the witness stand in support of his defense and explain his possession of the stolen property.

—State v. Richman, 315.

**Sedition Act.**

6. Laws 1917, c. 463, known as the Sedition Act, is a penal statute, and the innocence of the accused is to be presumed unless the words spoken by him, standing alone or when considered in connection with the occasion of their use, show guilt beyond a reasonable doubt.

—State v. Deike, 24.

**Evidence of Other Offenses.**

7. It was proper in this case to receive evidence of other sales of narcotics to the same addict and of other sales to other addicts. Such evidence was within the rule which permits evidence of this character when it is part of one scheme to violate the law or when it tends to show an inclination or predisposition to violate the law.

—State v. Whipple, 403.

**CUSTOM.**

**Of Trade Entered into the Terms of a Written Contract to Ship Bran.**  
See Contract, 17.

**In the Feed Trade as to Notice Before Breach of Contract.** See Sale, 7.  
A custom, though local, need not ordinarily be pleaded. In this case evidence of the usage was admissible.

—McDonald v. Union Hay Co. 43.



**DAMAGES.**

The Word "Damages" as Used in Section 8229, G. S. 1913 (Workmen's Compensation Act). See Workmen's Compensation Act, 2.

Special Damages. See Eminent Domain, 3.

Punitive Damages. See Assault and Battery, 2; Replevin, 2; Trespass, 6.

1. The rules as to exemplary damages apply to wrongful acts punishable as crimes. The fact that the act committed is a crime as well as a tort is not conclusive of the right to exemplary damages.

—Muenkel v. Muenkel, 33.

2. Compensatory and exemplary damages are given, if at all, in a lump sum.

—Muenkel v. Muenkel, 30.

Measure of Damages. See Contract, 13.

To Abutting Property from Street Improvement. See Eminent Domain, 1, 5.

In Case of Deceit in Exchange of Property. See Fraud, 1, 2.

In Action for Breach of Written Contract by Repudiation of Defendant. See Contract, 16.

In Action for Assault. See Assault and Battery, 1.

In Action for Breach of Contract.

3. Where a contract is repudiated after one of the parties has been to an expense in part performance or in preparing for performance, such expense can be recovered, and also the net profits, if any are proven.

—Periodical Press Co. v. Sherman-Elliott Co. 491.

In Action for Injunction. See Injunction, 4, 5.

In Action in Replevin. Pleading Value of Use of Property. See Replevin, 4.

In Action for Trespass—Not Excessive.

4. Action for assault on plaintiff's house and farm buildings. The physical damage was small. But there was testimony there were circumstances in aggravation that would sustain a substantial verdict. Verdict for \$1,200. Held: The damages are not excessive.

—Muenkel v. Muenkel, 30.

**DEATH.**

Presumption against Suicide. See Insurance, 15.

Evidence. See Workmen's Compensation Act, 3.

**DEATH BY WRONGFUL ACT.** See Master and Servant, 7; Poison, 4, 7; Railway, 8.

**DEATH BY WRONGFUL ACT—Continued.****Pleading.**

In an action for wrongful death, it is essential that there should be a direct allegation that plaintiff's intestate left a widow or next of kin.

—McCrossin v. Noyes, Bros. & Cutler, Inc. 186, 187.

**DEED.**

**Description.** See Navigable Water, 1, 2.

**Of Land by Vendee in Executory Contract of Sale.**

When the vendee in an executory contract of sale leases to the vendor riparian rights in part of the land described in the contract, the lease is valid and the rights thus granted to the vendor will not be affected by a deed thereafter delivered by him to the grantee in performance of the executory contract of sale. The deed will relate back and take effect as of the date of the contract.

—Greenfield v. Olson, 275.

**DEPARTURE.** See Pleading, 2.

**DIRECTOR GENERAL OF RAILROADS.**

**Substitution of Director General Error.** See Railway, 2.

**Order No. 50 in Partial Conflict with Act of Congress of March 21, 1918.**

See Railway, 1.

**DISCRIMINATION.**

**In Freight Rates.** See Carrier, 2.

**DISMISSAL AND NONSUIT.**

**Dismissal of Railway Company as Defendant.** See Railway, 2.

**Of Appeal from Municipal Court to District Court because of Defective Proof of Service of Notice of Appeal.** See Court.

**Dismissal of Appeal.** See Appeal and Error, 9.

**Of Criminal Case Certified to Supreme Court without Statutory Authority.** See Certified Case.

**Judgment after Dismissal.**

Judgment was erroneously given against a defendant as to whom the action had been dismissed.

—Bogstad v. Anderson, 336.

**DRAIN.**

**Drainage of Surface Water.** See Water and Watercourse.

**Benefit from Drainage Caused by Condemnation of Land for Highway.**

See Eminent Domain, 4.

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**DRAIN—Continued.**

**Construction of Private Sewer in Public Street.** See *Municipal Corporation*, 14, 15.

**Who Are Qualified to Sign Petition for Public Ditch.**

1. The phrase "owners of the land described in such petition," as used in chapter 441, section 4, p. 695, Laws 1917, which requires that the petition shall be signed "by not less than 25 [per cent] of the owners of the land described in such petition, but in no event shall more than eight signers be required," means owners of the land so designated in such petition that it is apparent that the construction of the proposed ditch will affect them or subject them to the expense thereof.

—State ex rel. v. Grindeland, 438.

2. By the amendment, Laws 1917, p. 694, c. 441, as to what persons shall sign the petition for a ditch, there was not any intention to change the qualification of the signers, but merely the number.

—State ex rel. v. Grindeland, 437.

**Who Are Qualified to Sign Petition for Judicial Ditch.**

3. Under section 5525, G. S. 1913, as amended by chapter 441, § 4, Laws 1917, persons whose lands are described in the petition as affected or benefited by the proposed ditch, though not traversed by it, are qualified to sign as petitioners.

—State ex rel. v. Grindeland, 435.

**Notice of Preliminary Hearing.**

4. The record does not show that relator did not have notice of the preliminary hearing, and, even if he did not, the court had jurisdiction to establish the ditch, since no part thereof passes over relator's land.

—State ex rel. v. Grindeland, 436.

**Order Not Subject to Collateral Attack.**

5. When a county ditch is regularly established by order of the county board and the assessment for benefits and damages is made and the ditch is constructed, the order is *res adjudicata* and the ditch proceeding is not subject to collateral attack.

—Garrett v. Skorstad, 256.

**Obstruction of Surface Water.**

6. When a county ditch runs along a highway and the earth from the ditch is wasted upon the highway, as is authorized by the statute, and a turnpike is made, and thereby a swale or coulee across the highway is dammed, so that the surface waters, in time of high water, do not take their natural course across the highway, a land-

**DRAIN—Continued.**

owner is not entitled to obtain in an independent action culverts or openings through the highway or turnpike, so that the flow of surface waters shall not be obstructed.

—Garrett v. Skorstad, 256.

7. The finding that plaintiff had performed its contract in all respects is sustained by the evidence.

—American Brick & Tile Co. v. Turnell, 96.

**Surety Company Not Released from Liability by Default of Contractor.**

8. The price of the tile furnished by plaintiff was payable in instalments.

Defendant, having executed a bond conditioned that the contractor should pay all just claims for material as they became due, is not released from liability thereon by the fact that plaintiff continued to furnish tile as required by its contract after the contractor had defaulted in his payments.

—American Brick & Tile Co. v. Turnell, 97.

**DRUG.** Sale of Narcotic. See Criminal Law, 7; Poison, 1.

**DUE PROCESS OF LAW.** See Constitution.

**EJECTMENT.** See Adverse Possession, 2.

**ELECTION.****Violation of Statute.**

1. In mandamus where the relator, a candidate for a public office, has violated a provision of the statute so as to render it unlawful for the auditor to issue to him a certificate of election, the writ will be denied, however meritorious the application may be on other grounds.

—Dale v. Johnson, 225.

**Contest.**

2. It is of vital interest to the public that the laws enacted for the purpose of freeing elections from improper influences be obeyed. Although the contest was initiated by the petitioners, it is authorized and prosecuted for the purpose of promoting the public welfare, and not for the purpose of promoting any personal interest of the petitioners. They have no other or different interest in it than other members of the body politic.

—Exrieder v. O'Keefe, 280.

**Signers to Petition for Contest.**

3. Where the petition for an election contest is signed by the requisite number of legally qualified petitioners and the notice has been

**ELECTION—Continued.**

duly served, the contestee cannot divest the court of jurisdiction by showing at the trial that certain of the petitioners had been induced to sign the petition by false representations, and evidence offered for that purpose was properly excluded.

—Exrieder v. O'Keefe, 278.

**Violation of Corrupt Practices Act.**

4. The evidence sustains the finding that appellant had violated the Corrupt Practices Act.

—Exrieder v. O'Keefe, 278.

**ELECTION OF REMEDY. See Insurance, 17.**

By an Employee under the Workmen's Compensation Act Who Is Injured in the Course of His Employment by the Actionable Negligence of a Third Party. See Workmen's Compensation Act, 11.

**EMINENT DOMAIN.**

Restricting Use of Property by Order of Municipal Board or Officer.  
See Injunction, 3.

1. The general rule of damages for injuries resulting to abutting property from street improvements made by municipal authority is the difference in the value of the property before and after the improvements are made.

—Berg v. Village of Chisholm, 267.

2. In the determination of which consideration will be given to the reasonable cost and expense necessary to a restoration of the property to its former condition of usefulness, including the construction of a retaining wall where necessary, and other items of specific repairs rendered necessary by the change of the street grade.

—Berg v. Village of Chisholm, 267.

3. The property owner is not entitled to the items of special damage referred to in addition to the diminution in value.

—Berg v. Village of Chisholm, 267.

**Offsetting Drainage Benefit.**

4. Upon a trial to determine the amount of benefits to which a landowner is entitled for the taking of a portion of his farm for a public highway, the benefit flowing to such land from drainage may be considered and offset against the value of the land taken when the proof is sufficiently certain and direct.

—Burg v. Township of Rosedale, 424.

**Encroachment on Street.**

5. The fact that a retaining wall, made necessary by such improvements, encroaches for the space of about eight inches upon a strip of land

**EMINENT DOMAIN—Continued.**

reserved for boulevarding purposes between the sidewalk and the lot line, held not a bar to the property owner's right to damages caused by the street improvements, and the fact of such encroachment does not constitute an equity pleadable as a defense under G. S. 1913, § 7756.

—Berg v. Village of Chisholm, 267.

6. The conclusions of the trial court that defendant was not entitled to affirmative relief under its equitable defense are sustained by the evidence.

—Berg v. Village of Chisholm, 267.

**Reassessment of Damages.**

7. Unless otherwise provided, land taken under the power of eminent domain is deemed to have been taken at the date of the filing of the award of damages, and if the damages are reassessed on appeal such reassessment is to be made with respect to the value and condition of the property at the time of the original award and as of that date, and the landowner is entitled to interest from the date of the original award on the amount of the award as finally fixed and determined less the value of whatever beneficial use he may have made of the land after the filing of the original award.

—Ford Motor Co. v. City of Minneapolis, 392.

8. It is presumed that an award made on appeal was made as of the date of the original award and that it did not include interest.

—Ford Motor Co. v. City of Minneapolis, 392.

**Reassessment of Damages upon Appeal.**

9. The city of Minneapolis established an alley under the power of eminent domain. On appeal to the district court from the award of damages, they were reassessed. Thereafter the landowner applied for the allowance of interest from the date of the original award and the city claimed an offset thereto for the use made of the land by the landowner after that date. Held: That the court had authority to allow the interest and also to determine the amount, if any, to which the city was entitled as an offset thereto, and that the court should have allowed the interest less a proper deduction for whatever use the landowner was shown to have made of the land, and may adopt any proper procedure for determining them.

—Ford Motor Co. v. City of Minneapolis, 392.

**EQUITY.**

Claim Not Barred for Delay Less than the Statutory Period. See Laches. Encroachment of Retaining Wall Upon Street Not Pleadable as a Defense under G. S. 1913, § 7756. See Eminent Domain, 5.

Equitable Title. Of Vendee to Executory Contract in Sale of Land. See Vendor and Purchaser, 3.

**ESTOPPEL.** See Bank and Banking, 5; Nuisance, 6.

Against County Board and District Court in Matter of Consolidation of School Districts. See School and School District, 1.

Against Landlord. See Landlord and Tenant, 1.

Against Vendee of Farm Land as to the Tillable Acreage. See Vendor and Purchaser, 1.

Against Parties to Executory Contract of Sale of Goods by Their Conduct. See Assignment, 6; Contract, 1.

Action on promissory note. The record does not show plaintiff entitled to a directed verdict on the ground of estoppel by reason of his accepting worthless stock of a corporation.

—First National Bank of Phillips v. Denfeld, 281.

**EVICITION.**

Constructive Eviction. See Landlord and Tenant, 2-4.

**EVIDENCE.****Judicial Notice.**

1. It is matter of common knowledge that an automobile traveling four or five miles an hour can be stopped within a very few feet.

—Roberts v. Ring, 152.

Of Facility with Which Fraud May Be Practiced under Guise of Gift from Husband to Wife. See Gift, 1.

2. The court takes notice of the fact that the sensibilities of individuals vary, some being more and others less annoyed by noises and dust than the average person.

—Brede v. Minnesota Crushed Stone Co. 379.

Presumption. See Criminal Law, 5; Eminent Domain, 8; Workmen's Compensation Act, 8.

Of Accused's Innocence. See Criminal Law, 6.

Against Suicide. See Insurance, 15.

Of Absolute Liability of a Tax. See Taxation, 2.

Statutory Presumption of Fraud from an Unfiled Assignment of a Debt. See Assignment, 2.

When Statutory Presumption from an Unfiled Assignment of a Debt Is Not Overcome by Evidence. See Assignment, 3.

Statutory Presumption that New Trial Was Not Granted because the Verdict Was Not Justified by the Evidence Immaterial in Determining whether the Order Is Appealable. See Appeal and Error, 1.

Of Fraud between Persons Occupying a Fiduciary Relationship, When. See Contract, 7.

Burden of Proof. See Carrier, 13, 14; Chattel Mortgage, 2; Contract, 7; Insurance, 16; Release, 1.

**EVIDENCE—Continued.**

On Assignee of an Unfiled Assignment of a Debt to Show that It is Not Fraudulent as to the Creditors of the Assignor. See Assignment, 2.

On Indorsee of Note to Show He Purchased for Value in Good Faith and without Notice. See Bills and Notes, 6.

Competency. That of Chief Clerk of Bureau of Assessments of St. Paul Competent. See Municipal Corporation, 7.

Of Telephone Conversation between Parties to Contract Admissible. See Sale, 8.

3. Evidence that one of several defendants, jointly sued, counseled restraint of lawlessness at the time of an affray, is admissible as to him. It was not error to reject certain evidence offered for that purpose, since it was not shown that the occasion was the same as the one complained of.

—Muenkel v. Muenkel, 29.

4. Plaintiff was insured by defendant against disability resulting from accidental injuries and sued on the contract. Defendant had issued to him a certificate of membership which contained none of the substantive provisions of the contract but stated that his application and the by-laws constituted the contract. No other policy was issued. Plaintiff put his certificate of membership in evidence, and proved the provision of the application and the by-law which included the part of the contract on which he relied to establish his cause of action, but on his objection the court excluded the remainder of the application and the remainder of the by-laws which included the part of the contract on which defendant relied to establish its defense. Held error.

—Aaberg v. Minnesota Commercial Men's Assn. 354.

5. By proving the provisions of the application and by-laws on which his cause of action rested, plaintiff gave defendant the right to prove the provisions of these documents on which its defense rested even if defendant would not have had this right otherwise.

—Aaberg v. Minnesota Commercial Men's Assn. 355.

**Best and Secondary.**

6. Where a letter acknowledging paternity is lost, secondary evidence of its contents may be received. In this case evidence of a household servant that the letter was kept in her trunk in her room and that before the trial she searched for the letter thoroughly, but could not find it, and she believed it had accidentally gotten in with a bunch of letters she had burned, was sufficient to permit secondary evidence of its contents.

—Anderson v. Oleson, 328.



**EVIDENCE—Continued.**

7. The cases hold that section 8378, G. S. 1913, disqualifying a person interested in the event of an action from testifying concerning any conversation with, or admission of, a decedent, refers to spoken words and does not preclude an interested party from giving evidence of the contents of a lost document.

—Anderson v. Oleson, 330.

**Parol Evidence of Modification of Contract Admissible.** See Sale, 7(1).

**Parol Evidence Inadmissible to Vary Bill of Sale.**

8. In an action on a promise of a vendee, embodied in a written bill of sale, to pay a debt owing by the vendor to plaintiff, the written promise cannot be varied by parol.

—Germain v. Great Northern Lumber Co. 312.

**Parol Evidence Did Not Vary Written Contract.**

9. Action for the purchase price of silo material delivered. An oral agreement was made and later a written order given. Defendant claimed an oral agreement by plaintiff to furnish a man to erect the silo was the inducement to give the order to purchase the material. **Held:** Testimony of an oral agreement was properly received over the objection that the agreement was merged in the contract evidenced by subsequent correspondence between the parties, for the correspondence did not purport to be a contract, and merely contained admissions as to the terms of the oral agreement.

—Farmers Handy Wagon Co. v. Askegaard, 13, 14.

**Opinion Evidence.**

10. The president of a village council, having no special or intimate knowledge of the nature or quality of the materials entering into the construction of a bridge owned by the village, does not come within the rule that the owner of property may testify to its value.

—McClure v. Village of Browns Valley, 339.

**EXCHANGE OF PROPERTY.** See Fraud, 1-4.

**EXPLOSIVE.**

Gunpowder. See Poison, 2.

**FRAUD.** See Appeal and Error, 8; Contract, 12; Release, 1.

In Negotiation of Promissory Note. See Bills and Notes, 1-5.

Notice to Indorsee of Fraud in Negotiation of Note. See Bills and Notes, 8.

In Misrepresentation of Financial Situation of Corporation. See Bills and Notes, 4.

**FRAUD—Continued.**

**Husband's Gift of Automobile to Wife.** See Gift, 1, 2.

**Liability of Stockholder to Subsequent Creditor of Corporation for Unpaid Stock.** See Corporation, 2.

**Measure of Damages Where Fraud in Exchange of Real Estate.**

1. In an action for damages for deceit in a transaction for the exchange of real property, the general rule of damages is the difference in value of what the plaintiffs were induced to part with and the value of what they received.

—Otterstetter v. Steenerson Bros. Lumber Co. 442.

2. The plaintiffs are entitled to recover, under the proofs and findings of the trial court, the difference between the value of the real estate parted with, plus the amount of the mortgage assumed, and the mortgage given by them, and the value of the land which they received in the transaction.

—Otterstetter v. Steenerson Bros. Lumber Co. 443.

3. Testimony considered, and held sufficient to justify the findings as to fraud and the value of the properties in question.

—Otterstetter v. Steenerson Bros. Lumber Co. 443.

4. There was no error in admitting proof of the amount of expense plaintiffs were put to in moving to and from the farm, under the pleadings. Nor was the same prejudicial; the court holding adversely to plaintiffs' contention as to a rescission.

—Otterstetter v. Steenerson Bros. Lumber Co. 443.

**FRAUDS (STATUTE OF).** See Sale, 7(1).

**Recital of "Value Received" in an Assignment Sufficient to Satisfy the Statute.** See Assignment, 4.

**Action Performable within One Year.**

1. Enforcement of the contract is not inhibited by the statute of frauds as it fixed no definite time for performance and was performable within one year and was actually consummated within that period.

—McRae v. Feigh, 241.

**Parol Partnership in Land.**

2. There may be a partnership in real estate formed by parol, notwithstanding the provisions of the statute of frauds requiring contracts relative to interests in real estate to be in writing; and it may be limited to a designated tract of land.

—Hammel v. Feigh, 115.

**Statute Inapplicable after Performance of Contract.**

3. The provision of the statute of frauds relative to agreements not to be performed within a year, if applicable to a contract of partner-

**FRAUDS (STATUTE OF)—Continued.**

ship such as found in this case, is not effective after the purposes of the partnership are accomplished; and an accounting in such a case will be had in accordance with the terms of the oral partnership agreement.

—Hammel v. Feigh, 116.

**GARNISHMENT.**

Equitable Lien of Interveners, by Virtue of Their Contract, to Bank Deposit Inferior to Lien of Plaintiff's Garnishment. See Lien.

**GIFT.**

Delivery of Husband's Gift to Wife. See Husband and Wife, 4, 5.

Avoidance of Gift to Wife by Subsequent Creditor of Husband.

1. A subsequent creditor of the husband cannot avoid the gift without proof that it was actually intended to defraud creditors, and that its purpose and effect was to prejudice them. Neither can he avoid it merely because it may have been made to defraud the husband's existing creditors. In determining whether a valid gift has been made, the law takes cognizance of the facility with which fraud may be accomplished under the pretense of gifts between husband and wife and of the fact that their every-day life is so blended that it is often difficult to know whether personal property kept where the family resides belongs to one or the other.

—Coulter v. Meining, 104.

2. Action in replevin by a wife to recover an automobile taken by defendant sheriff upon a writ of attachment against the property of her husband. Evidence that the contract for the car was made on May 31 and the agent who sold it was told the husband bought it for his wife, that the husband took out a state license to operate it in his name, and insured it in his name, and thereafter on July 10 gave his wife a bill of sale of the car. Subsequently he paid the wheelage tax on it in the city of Duluth. The court submitted to the jury the question who owned the car on May 31 and, if they found the wife owned it, they should find she owned it when the car was attached; and that the husband's indebtedness had nothing to do with the question who owned the car on May 31. Verdict for plaintiff. At the time of the purchase the husband was able to make a gift of the car to his wife. He had recently bought a residence for \$25,000, on which was a mortgage for \$15,000. He had a bank account of about \$5,000. His other indebtedness consisted of current bills. He was a promoter of mining enterprises and had just become a member of a mining syndicate. Held: The defendant was not

**GIFT—Continued.**

prejudiced by the instructions to the jury, and the order denying defendant's motion for judgment notwithstanding the verdict or for a new trial was affirmed.

—Coulter v. Meining, 104, 108, 109.

**GUARDIAN AD LITEM. See Infant.****HABEAS CORPUS. See Criminal Law, 3.****Trial by Jury.**

1. Where, as in this state, a trial by jury in a prosecution for a misdemeanor may be waived, a failure on the part of the justice to impanel a jury upon a plea of not guilty being entered is a mere error not affecting the jurisdiction, and does not entitle the prisoner to be discharged on habeas corpus.

—State ex rel. v. Carver, 27.

**Custody of Child.**

2. Upon an appeal in habeas corpus proceedings, pursuant to section 8312, G. S. 1913, where the controversy is as to the custody of a minor, the best interests of the child are the controlling consideration.

—State ex rel. v. Krueger, 149.

3. Shortly after his birth and the death of his mother, his maternal grandmother took the child to her home, where he has lived for 14 years, the father contributing very little to his support. The boy appears to be of good understanding and strongly averse to leaving his present home. Held: His wishes must be given just consideration and the evidence requires that the minor remain with his present custodian until further order, subject to the rights of the father and son to visit each other.

—State ex rel. v. Krueger, 149.

**HEALTH.**

The health of the people is an economic asset. The law recognizes its preservation as a matter of importance to the state. To the individual nothing is more valuable than health.

—Skillings v. Allen, 325.

Code of Health and Accident Insurance. See Insurance, 4.

**HIGHWAY.**

Landowner Not Entitled to Independent Action to Obtain Culverts when Swale across Highway is Dammed by Earth Wasted from a County Ditch. See Drain, 6.

**HOMESTEAD.**

**Conveyance of Homestead without Joinder of Wife. See Adverse Possession, 1, 2.**

1. Eighty acres of land and the dwelling house thereon, owned by a married man who had left his wife and children, and which were occupied by him with a woman unlawfully living with him as his wife, constituted his homestead as defined by G. S. 1913, § 6957. His deed, not signed by his lawful wife, was void as to such homestead.

—Rux v. Adam, 35.

**Descent of Husband's Homestead at His Death.**

2. Upon his death intestate, such homestead descended to his lawful wife and children, and their rights therein vested on the day he died, without any acts on their part or on the part of the probate court.

—Rux v. Adam, 35.

**Jurisdiction of Probate Court to Determine Boundaries.**

3. His widow had the right to invoke the aid of the probate court in determining the boundaries of his homestead, it being part of a tract of 120 acres, but that court had no jurisdiction to determine claims to the land which might be made by defendant under a deed of the entire tract from decedent. Defendant's rights under such a deed were adverse to those of plaintiff as decedent's widow, and did not rest upon a will or the laws of descent. The final decree of the probate court determining that the land which is the subject matter of this action constituted decedent's statutory homestead at the time of his death does not preclude defendant from litigating in this action the question of whether it was in fact his homestead.

—Rux v. Adam, 35.

**Abandonment.**

4. To constitute an abandonment of a homestead, there must be an actual removal from the premises. An intention to remove is insufficient.

—Millett v. Pearson, 189.

5. Action by a grantee of the owner to enjoin a judgment creditor of the grantor from selling the grantor's homestead upon execution to satisfy his judgment. Prior to the recovery of the judgment the grantor shot and killed his wife, was detained in jail at the time the judgment was obtained and until he was tried, convicted of murder and sentenced to the state prison for life. The conveyance to plaintiff was made while the grantor was in jail before his trial. The trial judge found that the grantor had abandoned his homestead prior to the execution of the deed to plaintiff. **Held:**

**HOMESTEAD—Continued.**

(1) His absence from the premises while under detention in the county jail raises no presumption of an intention to abandon his homestead.

(2) The premises remained the grantor's homestead until he conveyed them to plaintiff, and the injunction was granted.

—*Millett v. Pearson*, 187.

**Imprisonment of Owner.**

6. There must be an exercise of volition by persons free from restraint and capable of acting for themselves in order to acquire or lose a residence. A person imprisoned under operation of law does not thereby change his residence.

—*Millett v. Pearson*, 189.

7. On March 16, 1916, O was the owner of and occupied the premises in question with his wife, as their homestead. On that day he shot and killed his wife, and was immediately arrested and lodged in jail, where he remained until June, when he was convicted and sentenced to the state prison for life. Held, that said premises continued to be his homestead until he conveyed the same to plaintiff in May, 1916.

—*Millett v. Pearson*, 187.

**Compensation of Grantee under Husband's Sole Deed for Improvements.**

8. Evidence justified a finding that the occupant thereof was not entitled to compensation by virtue of G. S. 1913, § 8070, for improvements made thereon.

—*Rux v. Adam*, 36.

**Compensation for Improvements by Occupying Claimant.**

9. Under the occupying claimant's statute, one claiming compensation for improvements made on the land of another must prove, among other things, want of actual notice of the claim upon which the action to recover possession is founded previous to the time of making the improvements, and the payment of a valuable consideration for the land. The evidence did not require a finding that the former requisite existed. As to the latter requisite, a recital of a consideration in the deed to the occupant is not proof of the payment thereof as against a third person.

—*Rux v. Adam*, 36.

**HUSBAND AND WIFE.**

No Obligation upon Prospective Husband to Secure a Due Proportion of All His Property to His Prospective Wife. See Contract, 6.

**Antenuptial Contract.**

1. Antenuptial contracts are not against public policy, but are regarded

**HUSBAND AND WIFE—Continued.**

with favor as conducive to the welfare of the parties making them, and will be sustained whenever equitably and fairly made.

—Malchow v. Malchow, 53.

2. The relations of a man and woman betrothed to one another are presumably, but not invariably, confidential. Under the evidence the trial court was not bound to find that a widower of 65, father of 12 children, and a widow of 53, mother of 8 children, occupied a confidential relationship when their antenuptial contract was executed.

—Malchow v. Malchow, 54.

3. A widow appealed from the order of the probate court disallowing her application to take under the statute. The district court found that an antenuptial contract by which appellant was to get \$2,000 from her husband's estate in lieu of all statutory provisions and by which decedent waived all rights in his wife's property in case he outlived her, was a valid and binding contract, and affirmed the orders of the probate court. His estate amounted to about \$30,000. Affirmed on appeal to the supreme court.

—Malchow v. Malchow, 55.

**Husband's Gift of Automobile to Wife. See Gift, 1, 2.****Delivery of Gift to Wife.**

4. When property is purchased by a husband as a gift to his wife, with knowledge on the part of the vendor before the bargain is consummated that the property is bought for the wife, and that the title is to pass to her directly, there is a sufficient delivery to sustain the gift, although she does not get actual possession until later.

—Coulter v. Meining, 104.

5. A delivery through a third person is sufficient if he holds the property for the wife.

—Coulter v. Meining, 104.

6. Evidence considered, and held to justify a jury in finding that the husband made a valid gift of an automobile to his wife.

—Coulter v. Meining, 105.

**Conveyance of Statutory Homestead without Joinder of Wife. See Adverse Possession, 1, 2; Homestead, 1.****Descent of Homestead at Death of Husband Intestate. See Homestead, 2.****ICE.****Injunction to Restrain Maintenance of Ice Business. See Injunction, 2.**

**IMPROVEMENT.**

Compensation under Occupying Claimant's Statute. See Homestead, 8, 9.

**INCOMPETENT. See Insanity.**

Mental Capacity of Plaintiff when Executing Release. See Release, 2.

**INDIAN.**

Trust Patent.

Trust Patents under the Indian Allotment Act of February 8, 1887, to Certain Indians Do Not Convey a Marketable Title on Their Face. See Vendor and Purchaser, 10, 11.

The fact that the Clapp Amendment (approved June 21, 1906), to the General Indian Allotment Act of February 8, 1887, and acts supplementary thereto, declares that such patents shall operate as a transfer of the fee title as to mixed blood Indians, does not clear the title until the character of the particular Indian as a mixed blood is established as a matter of record.

—Geray v. Mahnomen Land Co. 383.

**INDICTMENT.**

Motion to Quash. See Certified Case.

**INFANT.**

Appointment of Guardian ad Litem.

Not Entitled to New Trial Because of Failure to Appoint Guardian ad Litem. See New Trial, 1.

If the court appoints a guardian ad litem during the trial, it may properly proceed.

—Muenkel v. Muenkel, 35.

**INHERITANCE TAX. See Taxation, 11-16.****INJUNCTION.**

To Restrain Operation of Stone Quarry as a Nuisance. See Nuisance, 1.

To Restrain Conduct of Lawful Business in Such Manner as to Interfere with Comfort of Neighbors. See Nuisance, 3.

Distinction between Cases Where Factory Is Removable and Cases Where the Business Is Mining, Quarrying, etc., and Not Removable. See Nuisance, 4.

To Restrain Sale of Grantor's Homestead upon Execution. See Homestead, 5.



**INJUNCTION—Continued.****Against Town and County Boards.**

1. An injunction against the members of a town board and of a county board, to restrain them from obstructing a swale which crosses plaintiff's land, by maintaining an embankment along a county ditch which intersects the coulee, was denied.

—Garrett v. Skorstad, 257.

**Action on Bond.**

2. In an action on an injunction bond the defendants cannot relitigate the merits involved in the action for an injunction; and where the action was to enjoin the maintenance of an ice house and the carrying on of an ice business on certain premises, an order of the city inspector of buildings made about the time of the commencement of the action directing the tearing down of the icehouse is not a bar to an action on the injunction bond.

—Pelkey v. National Surety Co. 176.

3. If the defendants in the action on the bond can avail themselves of the order of the building inspector as bearing upon the question of damages, the validity of the order is subject to attack by the plaintiff. An order of a municipal officer or board, in the exercise of a police power, restricting the use of property or ordering its destruction, may not amount to the taking of property without due process and the owner may not be entitled to an injunction; but at some time and in some way he is entitled to have determined in a judicial proceeding the rightfulness of the taking or destruction.

—Pelkey v. National Surety Co. 176.

**Damages.**

4. A plaintiff who seeks a permanent injunction only, and takes a temporary injunction giving him the same relief temporarily, is much in the position of one taking execution before judgment, and if he fails to get a judgment, it is not harsh that he be required to pay the damage he has caused.

—Pelkey v. National Surety Co. 178.

5. The plaintiff sustained some damage, aside from counsel fees incurred, by reason of the injunction. Whether his evidence shows any loss of profits is in doubt; and if there was a loss it was small.

—Pelkey v. National Surety Co. 176.

6. When the sole purpose of an action is to secure a permanent injunction, and a temporary injunction giving substantially the relief prayed is issued and remains in effect during the pendency of the action, and judgment is rendered in favor of the defendant, the reasonable value of counsel fees incurred in defending the action

**INJUNCTION—Continued.**

is recoverable in an action on the injunction bond.

—Pelkey v. National Surety Co. 176.

**Procedure.****Nature of Relief Determinable by Further Testimony.**

7. Further testimony should be taken to determine whether defendant may not remove or mitigate the annoyances complained of without seriously interfering with the prosecution of its business and such relief afforded to plaintiffs as may be justified by the additional evidence produced.

—Brede v. Minnesota Crushed Stone Co. 375.

**INSANITY.**

1. One who loans money to an insane person upon a promissory note without knowledge or notice of his insanity can recover upon it; and in this case the evidence sustains the finding that the plaintiff, loaning money to the defendant on his note, was without knowledge or notice of his insanity.

—Merchants National Bank of Detroit v. Coyle, 440.

**Of One Party to a Contract.**

2. The insanity of one party to a contract makes it only voidable, and it cannot be avoided where the other party acted in good faith, and was without notice or knowledge of the insanity, unless restoration can be made and the parties be placed in statu quo.

—Merchants National Bank of Detroit v. Coyle, 441.

**INSURANCE.**

**Law Governing Insurance Contract Applies to Surety Companies Writing Bonds for Profit.** See Principal and Surety.

**Unauthorized Assignment of Premium Note after Maturity.** See Bills and Notes, 9.

**Mutual Benefit.**

**All of Application and of By-Laws Admissible in Evidence when They Constitute the Contract.** See Evidence, 4, 5.

1. When a member of defendant association is accepted, the association issues to him a certificate of membership which states that his application and the by-laws constitute his contract of membership. The by-laws provide for special forms of insurance, and the applicant is required to designate in his application the particular form which he desires. The certificate of membership issued to plaintiff is in no sense a policy of insurance. Unless the application and by-laws are included with the certificate of membership as consti-

**INSURANCE—Continued.**

tuting the policy there is no policy whatever. G. S. 1913, §§ 3292, 3530.

—Aaberg v. Minnesota Commercial Men's Assn. 355, 360.

2. The word "policy" as used in the statute usually refers to the written instrument in which the contract of insurance is embodied. The certificate, the application and the by-laws constitute the only contract contemplated by the parties in the present case and is the only existing contract.

—Aaberg v. Minnesota Commercial Men's Assn. 354.

3. This contract violates the provisions of Laws 1913, p. 181, c. 156, but is valid by virtue of section 9 of that act (section 3530, G. S. 1913) and must be given effect as provided in that section.

—Aaberg v. Minnesota Commercial Men's Assn. 355.

4. Chapter 156, Laws of 1913, established a complete code regulating health and accident insurance, and excluded that class of insurance from the operation of section 3292, G. S. 1913, under which the proffered evidence was excluded.

—Aaberg v. Minnesota Commercial Men's Assn. 354.

5. Plaintiff's claim that this evidence was not admissible under the pleadings cannot be sustained.

—Aaberg v. Minnesota Commercial Men's Assn. 354.

6. Defendant is not within section 3536, G. S. 1913, as its membership is not confined to traveling salesmen.

—Aaberg v. Minnesota Commercial Men's Assn. 355.

**Accident.** See Evidence, 4; Insurance, 2-6; Release, 1.

7. The liability of the insurer became absolute when the accident occurred, and the right to indemnity, payable in future instalments, was not contingent upon the payment of premiums falling due after the date of the accident.

—Rechtzigel v. National Casualty Co. 303.

8. By the terms of the policy here involved, the insured was entitled to indemnity for total disability caused by accident if he was under the care of a physician during the period of disability, even though there was no medical treatment of his injury.

—Rechtzigel v. National Casualty Co. 303.

9. In many cases the very purpose for which accident insurance is written would be defeated if there could be no recovery for an injury which did not require the regular attendance of and treatment by a physician.

—Rechtzigel v. National Casualty Co. 306.

10. A provision of the policy requiring the insured to furnish physicians' reports as a condition precedent to the maintenance of an action

**INSURANCE—Continued.**

thereon has no application where the insurer asserts that it has made settlement in full and is released from further liability.

—*Rechtzigel v. National Casualty Co.* 302.

11. Upon a consideration of the evidence, it is held that it sustains a verdict in plaintiff's favor in an action on a policy of accident insurance as against a defense based on an alleged settlement and release of his claim for indemnity.

—*Rechtzigel v. National Casualty Co.* 302.

12. The court charged the jury that the defendant company was legally liable under its policy to pay plaintiff every 30 days, and the instruction is assigned as error. Held: That the instruction was immaterial and harmless, as plaintiff waited until the end of the full period covered by the policy before he brought suit.

—*Rechtzigel v. National Surety Co.* 307.

**Suicide.**

13. Action on defendant's policy. The answer alleged that the insured committed suicide. Verdict for plaintiff. Appeal from an order denying defendant's motion for judgment notwithstanding verdict. The insured for many years was a locomotive engineer, who was struck on the head in a collision between two engines. Evidence in behalf of plaintiff tending to show that he never recovered from the effects and that his brain was affected; that his conduct thereafter was unusual and indicative of mental disturbance. Evidence in behalf of defendant that the insured was an eccentric man before he was hurt; that after the accident he ran a switch engine successfully for more than a year, without exhibiting any evidence of mental derangement or change from his former condition, to the men who worked with him.

On the day of his death, his wife went out and on her return two hours later the insured was found lying in the kitchen of his house unconscious, with all the burners of the gas range turned on and none lighted. Held: The evidence was of such a nature that reasonable minds might properly reach different conclusions as to the inferences fairly deductible therefrom, and the trial court did not err in permitting a verdict of accidental death to stand.

—*Farrar v. Locomotive Engineers Mutual Life & Accident Insurance Assn.* 468, 470, 471, 472.

14. It was within the discretion of the trial court to receive testimony that the insured had expressed the belief that it was wrong to commit suicide without specifically limiting the proof to declarations made immediately preceding the date of his death.

—*Farrar v. Locomotive Engineers Mutual Life & Accident Insurance Assn.* 466.

**INSURANCE—Continued.**

15. If the evidence in an action on a policy of accident insurance is consistent with the theory of accidental death, the presumption which the law raises from the ordinary motives and principles of human conduct requires a finding against suicide.

—Farrar v. Locomotive Engineers Mutual Life & Accident Insurance Assn. 468.

16. When, by the terms of such policy, there can be no recovery in case of death unless death was caused by accidental means, the burden of proving that it was so caused rests on the plaintiff.

—Farrar v. Locomotive Engineers Mutual Life & Accident Insurance Assn. 468.

**Election of Remedies by Insurer.**

17. On learning of the agent's unauthorized assignment of a premium note, the insurance company had three courses open: First, it might repudiate his act and demand a return of the policies. Second, it might charge the agent with its share of the premiums, in which event the notes would belong to the agent. Third, it might ratify his act and demand the notes. This, the court found, the company did do. The evidence sustains this finding.

—Hoidale v. Cooley, 430.

**INTEREST.**

Knowledge of Purchaser of Promissory Note that Overdue Interest Was Unpaid for Four Years, a Circumstance Affecting His Good Faith. See Bills and Notes, 7.

Owner of Land Condemned Entitled to Interest on Amount of Final Award from Date of Original Award. See Eminent Domain, 7.

Value of the Use of Land by Owner after Original Award May Be Offset against the Amount of Interest upon Reassessment on Condemnation of Land. See Eminent Domain, 9.

**INTERVENTION. See Trover and Conversion.**

When Two Parties in Intervention Case May Be Represented by the Same Attorney. See Attorney and Client, 1.

An Insurance Company Had the Right to Intervene in an Action on a Premium Note which Had Been Assigned by an Agent after Maturity without Authority. See Bills and Notes, 9.

The Complaint Stated a Case. See Bills and Notes, 9.

**JOINT ADVENTURE. See Partnership, 1.**

1. A joint adventure can arise only by contract or agreement between the parties to join their efforts in furtherance of a particular trans-

**JOINT ADVENTURE—Continued.**

action or series of transactions.

—National Surety Co. v. Winslow, 71.

2. In the absence of express limitations in that respect, each party to a joint adventure is subject to all losses and liabilities, and entitled to share equally in the profits of the undertaking. The relationship is substantially that of a partnership.

—National Surety Co. v. Winslow, 71.

3. The contract did not create the relation of joint adventure or copartnership, and no right to the fund arises from any source of that kind.

—National Surety Co. v. Winslow, 66.

**JUDGMENT.**

**Against a Defendant as to Whom the Action Has Been Previously Dismissed Is Erroneous.** See Dismissal and Nonsuit.

**Personal Judgment in Tax Proceedings Void without Personal Notice or Attachment of Property.** See Taxation, 7.

**For Local Assessment Should Omit Exempted Part of Lot from Assessment Roll.** See Municipal Corporation, 8.

**By Default.**

1. In an action commenced in the district court, the summons and complaint were served on defendant personally. The summons required her to serve her answer to the complaint "within twenty or \* \* \* after service of this summons upon you," omitting the word "days." She failed to answer and a default judgment was entered against her. Held that, notwithstanding the defect in the summons, the court acquired jurisdiction to enter the judgment.

—Flanery v. Kusha, 308, 309.

**Modification. When Modification Is Not Asked for by Appellant, but Appellate Court Grants Permission for Application to Trial Court.** See Appeal and Error, 17.

**Collateral Attack on Final Decree of Probate Court that Land Constituted Intestate's Statutory Homestead.** See Homestead, 3.

**Bar by Former Judgment.**

2. Action on four small promissory notes executed at different times. The answer pleaded a former adjudication in bar, set out the pleadings in the former action in full, alleged that at the trial of that suit the notes were in issue, were received in evidence, and judgment was entered in favor of defendant. The former action was to recover the value of 250 bushels of corn alleged to have been converted by the plaintiff in the present action. The answer alleged that Olson was Berkner's tenant under a written lease by the terms of

**JUDGMENT—Continued.**

which his farm was let on shares, the crops raised thereon were to belong to Berkner until harvested and a division thereof made; that Berkner had the right to enter the farm and possess himself of enough of Olson's share to reimburse himself for all advances made; that the corn was raised under the lease; that there had been no division of crops and Berkner had advanced to Olson \$280 in money and property which was due at the time Berkner took the corn under the provisions of the lease to reimburse himself for the advances, and that the value of the corn did not exceed \$150. In the pleadings and judgment in the former action there was not any mention of any note. The court charged the jury in substance that in case they found there had been a division of the corn crop raised, and the corn taken by Berkner was the part thereof set aside for Olson, they were not to consider the notes or any of the \$280 indebtedness to Berkner. As defendant in this action pleaded the former adjudication in bar, the burden was on him to prove that each cause of action or each note entered into or should have entered into the verdict rendered in the prior action. Held: The finding that the former adjudication was not a bar to any of the causes of action stated in the complaint herein was sustained by the record.

—Berkner v. Olson, 214.

**Res Adjudicata.**

Order Establishing County Ditch. See Drain, 5.

3. A judgment, rendered after a chattel mortgage foreclosure sale, in an action between the defendant and the mortgagor, is not evidence in favor of the plaintiff in this action, nor is a judgment in an action between this plaintiff and another claimant of the property.

—Bogstad v. Anderson, 336.

Form of Judgment on Premium Note in Favor of Assignee. See Bills and Notes, 13.

Unsatisfied Judgment for an Instalment on an Executory Land Contract, Discharged of Record by the Termination of the Contract by the Vendor. See Vendor and Purchaser, 4.

Damages for Taking Execution before Judgment. See Injunction, 4.

No Appeal from Findings and Conclusion of Law before Motion for a New Trial or Entry of Judgment. See Appeal and Error, 2.

Judgment Against County for Costs Vacated. See Costs.

**JUDGMENT NOTWITHSTANDING VERDICT. See Gift, 2; Trover and Conversion.**

Where the prevailing party has adduced direct and positive testimony of the existence of facts which, if found true by the jury, clearly call

**JUDGMENT NOTWITHSTANDING VERDICT—Continued.**

for the verdict rendered, the opposing litigant is not entitled to judgment notwithstanding, unless such testimony is demonstrably false, and it is made to appear that the defect in the proof could not be remedied on another trial.

—Amy v. Wallace-Robinson Lumber Co. 427.

**JURY.**

Failure to Impanel a Jury in a Misdemeanor Case Does Not Require Discharge of Prisoner. See Habeas Corpus, 1.

**JUSTICE OF THE PEACE.**

Conviction by Justice without Trial by Jury. See Criminal Law, 3.

Failure to Impanel a Jury in a Misdemeanor Case, Does Not Require Discharge of Prisoner. See Habeas Corpus, 1.

**LACHES.**

Not Open as a Defense in Suit for Injunction, When. See Nuisance, 7.  
Action to recover for services in connection with negotiating a mineral lease of the property described, a specified share of the royalty paid by the lessee. No part of the claim was barred by the statute of limitations. A court of equity will not bar a claim for a delay of less than the statutory period, unless it be shown that the enforcement of the claim will result in substantial injury to innocent parties.

—McRae v. Feigh, 246.

**LANDLORD AND TENANT.**

Lease of Riparian Rights of Vendee in an Executory Contract of Sale to His Vendor Is Not Affected by Subsequent Deed from the Vendor in Performance of the Contract. See Deed.

State Mining Lease. See Mine and Mineral, 1-3.

Mineral Lease. Estoppel of Landlord.

1. The mineral lease having been actually effected on terms satisfactory to the owner of the premises leased, he is not in position to complain that some of these terms were not expressly specified in his agreement with plaintiff to obtain a lease at the time it was first made.

—McRae v. Feigh, 249.

**Constructive Eviction.**

2. When the beneficial enjoyment of leased premises is so interfered with by the lessor as fairly to justify an abandonment by the lessee, there is a constructive eviction. It does not suppose an actual ouster or dispossession by the lessor.

—Santrizos v. Public Drug Co. 222.



**LANDLORD AND TENANT—Continued.**

3. The plaintiff conducted an extensive fruit, confectionery, cigar and flower store. He sublet a space 10 by 49 feet to the defendant for use as a drug store. There was no separation of the portion leased. The defendant, claiming a constructive eviction, abandoned the premises and refused to pay rent. It claimed that there was a constructive eviction by the shutting off of the lights, by the obstruction of its space by a weighing machine, by the refusal of the plaintiff to furnish it a key, by the interference with its business by mechanical and other music, and by petty gambling and disorder, all in the plaintiff's portion of the store. It is held that the evidence did not require a finding of facts constituting a constructive eviction.

—Santrizos v. Public Drug Co. 222.

4. Usually the question whether there is a constructive eviction is one of fact, with each case largely dependent upon its particular circumstances.

—Santrizos v. Public Drug Co. 223.

**LETTER.**

Asking for Confirmation of Account if Amount Due Was Found Correct.

See Account Stated.

Admitted in Evidence to Explain the Mailing of a Certificate of Stock.

See Bills and Notes, 10.

Acknowledging Paternity. See Bastard, 1, 2.

Secondary Evidence of Lost Letter of Paternity. See Evidence, 6; Witness, 2.

**LICENSE.**

Revocable. See Nuisance, 5.

**LIEN.**

Equitable Lien Not Superior to Lien of Garnishment.

- A contract between defendant and interveners recited that defendant had secured contracts for laying flooring in certain buildings under construction, and to enable him to perform them interveners agreed to advance him the funds necessary for material and labor, not to exceed \$10,000. All moneys advanced and those paid defendant on the contracts were to be deposited in his name in a bank satisfactory to the parties to be drawn out on his check, countersigned by interveners, until they were repaid. It was agreed that in case of default in payments on the contracts, interveners, as defendant's

**LIEN—Continued.**

agents and representatives, were authorized to institute in his name all necessary actions and proceedings, and in case defendant filed liens for material and labor he would assign the same to interveners as further security for the repayment of their advances. It was expressly agreed that interveners were not in any wise bound to fulfil defendant's contracts. Net profits were to be equally divided between defendant and interveners on a basis of computation stated in the agreement.

Plaintiff, a judgment creditor of defendant, sued him and garnished the bank in which the moneys were deposited and a partnership which owed defendant. The bank disclosed a balance of some \$900 and the partnership disclosed an indebtedness of \$3,000. Prior to the service of the garnishment defendant assigned to interveners the debt from the firm and the firm accepted it. The interveners appeared and filed their complaint in intervention, claiming the money on deposit in the bank and the indebtedness due defendant. Held:

The contract did not vest in the latter any right, by way of equitable lien or otherwise, to the fund in litigation superior or paramount to that of a garnishment creditor.

—National Surety Co. v. Winslow, 66, 69.

**LIMITATION OF ACTION.****Action for Agreed Compensation.**

The cause of action was not barred by the statute of limitations. At the time plaintiff brought this suit in equity he could have maintained an action at law on the contract to recover his share of each payment of royalty to defendant Feigh.

—McRae v. Feigh, 241, 246.

**LOG AND LOGGING.**

Plaintiff claimed defendants in the winter of 1914 and 1915 entered her land, cut and removed merchantable timber. Evidence on the part of plaintiff from the owner of an adjoining forty, his wife and young sons, and from other parties, that defendants during that winter logged this land, in connection with 18 other forties. Evidence on the part of defendants that all merchantable timber on plaintiff's land had been cut and removed in the winter of 1910 and 1911, and hence there was no timber removable in 1914. There was also irreconcilable conflict between the experts of the parties as to what the stumps disclosed as to the time of cutting. The testimony was flatly contradictory. Two verdicts in favor of plaintiff. Held: The

**LOG AND LOGGING—Continued.**

case was peculiarly within the province of the jury to determine which of two contradictory versions was the true one, especially when the number of disinterested witnesses was about the same on both sides.

—Amy v. Wallace-Robinson Lumber Co. 427.

**MALICE.**

Of Incompetent Person for Whom the Probate Court Had Appointed a Guardian. See Assault and Battery, 2.

Evidence Admissible. See Trespass, 1.

**MANDAMUS.**

Writ to Procure Certificate of Election Denied for Violation of Statute. See Election, 1.

**MASTER AND SERVANT.**

Contract of Employment. Breach.

1. The question whether there was a breach of the contract by the wrongful discharge of plaintiff as manager of defendant's bond department, was one of fact, and the verdict of the jury thereon is sustained by the evidence.

—Bacon v. Bankers Trust & Savings Bank, 318.

Servant's Selection of Place of Work.

2. The rule that a servant who voluntarily selects a place for the performance of his work other than that provided by the master, and is injured from defects in the place so selected, is not entitled to recover for such injuries, followed and applied in a case where plaintiff was engaged in unloading and rolling to a place of storage large heavy iron tires for locomotive wheels.

—Kivak v. Great Northern Railway Co. 196.

Negligence of Fellow Servants.

3. Evidence held insufficient to justify a verdict of negligence in the failure of fellow servants to go to the rescue of plaintiff when in a position of peril.

—Kivak v. Great Northern Railway Co. 197.

Assumption of Risk.

4. Deceased did not assume the risk of the negligence of the train men.

—Molstad v. Minneapolis & St. Louis Railroad Co. 260.

Negligence in Giving Signals of Danger.

5. An engine of defendant railroad company ran over a track workman working in the dark on the tracks, with a lighted lantern beside him. There is evidence that the engineer and fireman were negligent in failing to give customary signals and failing to keep a prop-

**MASTER AND SERVANT—Continued.**

er lookout ahead.

—Molstad v. Minneapolis & St. Louis Railroad Co. 260.

**Negligent Operation of Automobile.**

6. This court stands committed to the rule that where the head of the family makes it his business to provide recreation and pleasure for the family and its several members and to that end furnishes an automobile, he is responsible for its negligent use by any one of the family having his permission to drive it.

—Johnson v. Smith, 352.

7. In this action for wrongful death caused by the alleged negligent operation of an automobile in which plaintiff's intestate was riding it is held:

(1) There was no evidence upon which to submit the defense of contributory negligence.

(2) Upon the admissions made by the defendant Swan Smith that he provided the automobile for the pleasure and recreation of the family, that the defendant Harold Smith, his minor son, was a member of the family, and had the privilege of using the car whenever he desired, and the undisputed evidence that plaintiff's intestate was a guest at defendants' home, and was being taken from an entertainment to her home, at the time of the accident, with the acquiescence of Swan Smith, the court did not err when instructing the jury that if they found the son liable they should also find the father liable.

—Johnson v. Smith, 350.

8. The charge of the court was not argumentative, and properly pointed out the items of negligence pleaded upon which alone sufficient evidence had been adduced.

—Johnson v. Smith, 350.

**MECHANIC'S LIEN.**

Enforcement. See Accord and Satisfaction, 2.

**MINE AND MINERAL.**

Broker's Action for Compensation. See Broker, 2.

**State Mining Lease.**

1. A state mining lease is in fact as it is in form a lease and not a conveyance of ore in place. It provides that there shall be a minimum output of 5,000 tons annually, and that in case such amount is not removed the lessee shall pay the state a royalty of 25 cents per ton on 5,000 tons. There is no provision that if the lessee does not

**MINE AND MINERAL—Continued.**

in any one year take such amount the required annual payment paid the state for such year may be applied wholly or in part on ore taken in subsequent years in excess of the stipulated minimum. It is held that the minimum royalty is the agreed compensation for the use and occupancy for a year of the property demised for the purposes and uses and in the manner and with the rights fixed by the lease, and for it the lessee gets, among other things, the right to take within the year 5,000 tons of ore; that it is not the purchase price of 5,000 tons of ore which if not taken within the year may be subsequently taken; that it is not advance royalty; and that the lessee who takes in a given year no ore or less than the minimum cannot have his annual payment of \$1,250 for such year applied wholly or in part on royalties accruing in subsequent years on ore mined in such years in excess of the minimum.

—State v. Cavour Mining Co. 271.

—State v. Hobart Mining Co. 457, 466.

**Royalty Payable on Crude Ores. See Constitution, 2.**

2. By the state mining lease lands are leased "for the purpose of exploring for, mining, taking out and removing therefrom the merchantable shipping iron ore." The lessee agrees to pay the state "for all the iron ore mined and removed \* \* \* at the rate of twenty-five cents per ton." In defendant's mine operated under a state lease is a body of low grade ore which cannot be used in the furnaces under present furnace methods. It can be mined and washed in a washing plant constructed upon the leased premises and the concentrates be shipped to the furnaces and sold and a profit result after paying the mining, washing, and transportation charges and the royalty. No profit will result if the mined ore is shipped to the furnaces, and washed there, the cost of transportation being such as to prevent.

Held, that the mined iron ore before washing is the ore referred to in the lease and upon it the lessee must pay the royalty of 25 cents per ton and not upon the lesser tonnage of concentrates.

—State v. Hobart Iron Co. 457.

**Washing Ore Is Not Mining.**

3. Within the meaning of a state mining lease, so far as it concerns the provision for the payment of royalty, whatever it may be elsewhere, the washing process is not mining. The washing process is a treatment of the ore.

—State v. Hobart Iron Co. 462, 463.

**MISTAKE.** See Sale, 1, 2.

**MORTGAGE.** See Fraud, 2.

Notice to Mortgagees of Corporation of Purpose for which Loan is Negotiated. See Corporation, 3.

Where Encumbrance on Whole Tract Made It Difficult to Make Partition. See Partition.

The evidence on the issue whether a deed from the owner to plaintiff was a mortgage, was such that the jury might have found either way. They found in favor of plaintiff. Held: The supreme court was not warranted in setting the verdict aside.

—First National Bank, Northfield v. Coon, 265, 266.

**MUNICIPAL CORPORATION.**

Building Inspection.

Order of Inspector to Tear Down Building Not a Bar to an Action on an Injunction Bond. See Injunction, 2.

Unauthorized Contract.

1. A provision of a city charter that "every ordinance, order or resolution, appropriating money, creating any liability of the city, awarding or approving of any contract for the payment of money \* \* \* shall require a four-fifths vote of all members of the city council," applies to a contract creating an obligation on the part of the city to furnish steam for power. Such a contract authorized by a "motion" "made and carried" by three of five councilmen is of no effect.

—Tracy Cement Tile Co. v. City of Tracy, 415.

2. Such a contract, being one which the city had power to make, may be subsequently ratified. Ratification can only be by the city council acting as a body. It may be effected by any action or contract which gives to the contract the stamp of approval and this may be done by acquiescence with knowledge of the facts.

—Tracy Cement Tile Co. v. City of Tracy, 416.

3. The evidence of ratification in this case is insufficient. There is no evidence of knowledge on the part of the absent members of the terms of the contract.

—Tracy Cement Tile Co. v. City of Tracy, 416.

4. A contract which the city had no power to make cannot, of course, be ratified at all.

—Tracy Cement Tile Co. v. City of Tracy, 418.

Local Assessment.

5. A finding that part of the land lying between the base line of a bluff and the edge of the Mississippi river, was occupied and used for the

**MUNICIPAL CORPORATION—Continued.**

purposes of defendant's railroad, and that the level portions on the top of the bluff, which had a perpendicular elevation of 112 feet, were well adapted for gardening and building purposes and had not been in any way used for railway purposes, warrants an assessment on the level ground at the top of the bluff for benefits on account of the construction of curbing, paving, ornamental lamp standards, etc., of a street on which the level ground abutted.

—City of St. Paul v. Chicago, Burlington & Quincy Railroad Co.  
450, 451.

6. Upon a hearing before the court upon application by the city of St. Paul for judgment confirming an assessment made for local improvement under section 247 of the city charter, testimony is admissible to prove that the assessment was not made under a mistake of fact or upon erroneous principles of law.

—City of St. Paul v. Chicago, Burlington & Quincy Railroad Co.  
449.

7. The uncontradicted testimony of the chief clerk of the bureau of assessments, the department of the city charged with the duty of ascertaining and spreading assessments for local improvements, that he personally examined the ground to obtain the data for the assessment, was competent as tending to prove that there was no mistake of fact and that the assessment was not made upon an illegal or erroneous principle of law. Section 247 of the St. Paul city charter, under which it is clear the court, at the hearing for confirmation of the assessment, may inquire and determine whether the whole or any part of the lot is to be assessed and the amount of such assessment, justifies the admission of such testimony.

—City of St. Paul v. Chicago, Burlington & Quincy Railroad Co.  
452.

**Modification of Order for Judgment in Trial Court.** See Appeal and Error, 17.

8. If on such application it appears that part of a lot or parcel against which an assessment is sought, is exempt from assessment, the judgment should eliminate that part from the assessment roll.

—City of St. Paul v. Chicago, Burlington & Quincy Railroad Co.  
449.

**Change of Street Grade.** See Eminent Domain, 2, 3.

**Exercise of Police Power.**

9. Municipal officers and boards in the exercise of the police power often command and enforce restraints upon the use of private property which do not amount to the taking of property without due process, although there is no hearing, and from the doing of which they cannot be enjoined.

—Palkey v. National Surety Co. 130.

**MUNICIPAL CORPORATION—Continued.**

**Order Restraining Use of Property. See Injunction, 3.**

**Negligence in Driving Motor in Crowded Street.**

10. Defendant, 77 years old and with defective sight and hearing, was driving an automobile on a city street. He drove over a boy of seven. The street was crowded and the boy ran from behind another conveyance. Defendant was driving four or five miles an hour. He testified that he saw the boy at a distance of four or five feet from the car. On other occasions he is alleged to have said he did not see the boy at all. His automobile passed clear over the boy. Held, the evidence raised an issue of fact as to his negligence, and as to the boy's contributory negligence.

—*Roberts v. Ring*, 151.

11. Plaintiff was struck and injured by defendant's auto truck at a street intersection. He was walking south along the easterly side of the street early in the evening. There was an electric light at the street intersection. When he reached the cross street he testified that he looked first to the east and then to the west, as he stepped from the curb to the pavement, and saw no street cars or other vehicles approaching from any direction and no pedestrians in the street. He proceeded across the street and was struck when he had advanced some 30 feet. Held: The evidence made a question for the jury as to whether he was guilty of contributory negligence.

—*Johnson v. Brastad*, 332.

12. Plaintiff alighted from a street car, passed around the end of the car and as he reached the parallel street car track was struck by defendant's delivery team traveling in the same direction as the street car. The driver of the team saw the car stop, three or four passengers alight and pass around the end of the car toward the other side of the street, but apparently made no effort to check his team. Plaintiff followed these passengers. He testified he looked to the east—the direction in which the street car was traveling—but not the west. Held: The question of defendant's negligence and that of plaintiff's contributory negligence were for the jury.

—*Lindell v. Citizens Ice & Fuel Co.* 479.

13. The court charged the jury that in determining the contributory negligence of the boy they should take his age into account and that in determining the negligence of defendant they might take into account his age and infirmities. This plainly meant that such facts were to be considered extenuation in both cases. This was errone-



**MUNICIPAL CORPORATION—Continued.**

ous as to defendant. When one injures others, his negligence is to be judged by the standard of care usually exercised by the ordinarily prudent normal man.

—Roberts v. Ring, 151.

**Connection with Sewer.**

14. The city had control of the streets, and, while it could not divest itself of the power to exercise such control in the future, it could give private parties the privilege of furnishing a sewer service necessary for the convenience and welfare of the citizens of that locality. Street-car lines, telephone lines, water mains and similar facilities, owned by private parties, are found in the streets of nearly all cities, and the power of the city to authorize the use of the streets for such purposes, is too well settled to require the citation of authorities.

—Lee v. Scriver, 20.

**Connection with Private Sewer.**

15. Certain property owners in the city of Northfield constructed a sewer in the street in front of their property at their own expense under an ordinance which authorized them to do so, and which provided that any person desiring to connect with the sewer should be permitted to make such connection on paying his proportionate part of the cost thereof. Defendant connected his property with an extension of the sewer constructed by other parties. The parties who had defrayed the expense of constructing the original sewer brought suit to collect from defendant his proportionate part of the cost thereof.

Held, that the ordinance is not void as delegating non-delegable powers to the grantees therein; that defendant is not absolved from the obligation to pay his proportionate part of the cost of the sewer by the fact that he connected with it through an extension constructed by other parties; and that defendant's claim that the amounts expended by plaintiffs have already been repaid to them is without support in the evidence.

—Lee v. Scriver, 17.

**NAVIGABLE WATER.**

1. A deed to land, located in a government lot bordering upon a meandered lake, described by metes and bounds, without any reference to the lake, in the absence of a showing to the contrary, conveys only the land embraced within the lines of the description, and does not carry with it any riparian rights.

—Stavanau v. Gray, 1.

**NAVIGABLE WATER—Continued.**

2. In arriving at the intention of the parties to a deed of land in a government lot bordering upon a meandered lake, the conveyance must be read and considered in the light of existing conditions, and parol evidence of the intention of the parties is inadmissible.

—*Stavanau v. Gray*, 1.

**NEGLIGENCE.****Liability for Direct Results Caused.**

1. Generally speaking, one is responsible for the direct consequences of his negligent acts whenever he is placed in such a position with regard to another that it is obvious that if he does not use due care in his own conduct he will cause injury to that person. This principle is applicable to the facts stated, and the court properly overruled a demurrer to the complaint.

—*Skillings v. Allen*, 324, 325.

Of Attorney in Conduct of Trial. See Pleading, 1.

In Professional Treatment of Infectious Disease. See Physician and Surgeon, 3.

Exercise of Care at Grade Crossing by Traveler and Railway Company. See Railway, 3.

Of Railway Company in Maintenance of Grade Crossing. See Railway, 4.

Of Railway Company for Failure to Maintain Gates or Bell or Flagman at Grade Crossing. See Railway, 5.

Of Railway Company in Operation of Train Approaching Grade Crossing. See Railway, 6.

In Driving Motor through Crowded City Street. See Municipal Corporation, 10.

Of Fellow Servant. See Master and Servant, 3.

Proximate Cause. See Workmen's Compensation Act, 10.

Concurrent Negligence.

Of Railway Company in Causing Accident at Grade Crossing. See Railway, 7.

Contributory Negligence. See Railway, 8.

Contributory Negligence of Minor. See Municipal Corporation, 13.

2. A boy of seven ran from behind a buggy across the street and in front of defendant's automobile. He was struck and injured. Held: In determining whether the boy was negligent, the standard is the degree of care commonly exercised by the ordinary boy of his age and maturity. Had a mature man acted as did the boy, he might have been chargeable with negligence as a matter of law. But a boy is

**NEGLIGENCE—Continued.**

not held to the same standard of care in self-protection.

—*Roberts v. Ring*, 152, 153.

**Contributory Negligence of Pedestrian.** See *Municipal Corporation*, 11, 12.

**Contributory Negligence of Man with Defective Sight and Hearing.** See *Municipal Corporation*, 13.

**Gross Negligence.**

3. A person under contract with the school district to transport children to and from school used a sleigh, the body of which was covered with canvas, had a door in the rear and one in front with two panes of glass in it, through which the driver could see the road in front. It was impossible for the driver, when within the inclosure, to look to the right or left, except through the window in the front. Seated on a chair behind the door, unable to look up or down the track, he drove upon a railway crossing, without stopping to send one of the children ahead to look for a train, and the sleigh was struck by a train and several children killed. Held: The driver was guilty of gross negligence.

—*Gowan v. McAdoo*, 232, 233.

**NEGOTIABLE INSTRUMENTS ACT.**

**Silent as to the Duty of Bank in Collecting Out of Town Checks.** See *Bank and Banking*, 8.

**Negotiation of Note "In Breach of Faith."** See *Bills and Notes*, 1.

**Fraud in Negotiation of Promissory Note Makes the Title of the Payee Defective.** See *Bills and Notes*, 4.

**NEW TRIAL.**

**Because of Failure to Appoint Guardian ad Litem for Minor.**

1. One of six defendants was a minor, but was over 20 years old, at the trial. He was ably defended by the same attorney who defended the others. He admitted wrongdoing. After verdict he asked for appointment of a guardian ad litem and for a new trial on the ground of his infancy. The application was presented by the attorney who represented him on the other trial. No other attorney was suggested. No prejudice was shown. After he became of age the motion for a new trial was denied. Held no error.

—*Muenkel v. Muenkel*, 30.

**Because of Misconduct of Counsel.**

2. There was impropriety in the conduct of counsel for plaintiff in stating before the jury that he could prove certain facts, which were

**NEW TRIAL—Continued.**

wholly immaterial and of which proof was inadmissible. Whether a new trial should be granted for misconduct is largely within the discretion of the trial court. It is held that it was not error to refuse a new trial upon the ground of misconduct.

—Hammel v. Feigh, 116.

3. A new trial upon the ground of misconduct of counsel is not granted as a disciplinary measure but because injustice has been done.

—Hammel v. Feigh, 125.

4. The misconduct of plaintiff's attorney in asking improper questions and making improper remarks was not of sufficient consequence to require a new trial.

—Johnson v. Brastad, 332.

Because Verdict Was Not Justified by the Evidence. See Appeal and Error, 1.

Because of Striking Case from the Calendar. See Appeal and Error, 4.

When the Order Granting Motion Was Silent on the Reason Therefor.

See Appeal and Error, 9.

Not Granted because of Error in the Amount of the General Verdict.

See Appeal and Error, 18.

**NOTICE.**

Of Appeal.

Written Admission of Service "by Mailing" Notice of Appeal from Municipal Court. See Appeal and Error, 3.

Of Election Contest. See Election, 3.

Of Danger Given by Name of Poison or Explosive. See Poison, 2, 3.

Of Cancellation of Executory Land Contract under the Statute. See Vendor and Purchaser, 6, 7.

To Defendant of Beginning of Action. See Process.

To Mortgagee of Corporation of Purpose for which Loan Was Negotiated. See Corporation, 3.

Want of Notice by Occupying Claimant. See Homestead, 9.

**NUISANCE.**

Noise and Dust. See Evidence, 2.

Blasting at Stone Quarry.

1. When the undisputed evidence shows substantial interference with the comfort of residents in the vicinity of a stone quarry, caused by blasting and dust, they are entitled to some relief in an action brought to restrain the defendant from operating the quarry in such a manner as to constitute a nuisance.

—Brede v. Minnesota Crushed Stone Co. 374.

**NUISANCE—Continued.****Liability of Landowner Conducting a Lawful Business.**

2. A landowner may be liable for maintaining a nuisance by reason of his mode of carrying on a lawful business, even though the annoyances complained of are ordinary incidents of such a business when properly conducted.

—Brede v. Minnesota Crushed Stone Co. 375.

**Comparison of Injury Inflicted Not the Test of Relief.**

3. If a lawful business is conducted in such a manner as to interfere materially with the physical comfort of persons of ordinary sensibilities and habits, who live near by, an injunction should be granted, permanently restraining its operation in such manner. A comparison of the injury defendant will suffer if an injunction is granted with the injury plaintiffs will suffer if it is denied does not furnish the test by which the action of the court should be controlled.

—Brede v. Minnesota Crushed Stone Co. 374.

**Distinction between Movable and Immovable Business.**

4. A distinction may properly be drawn between cases involving a nuisance, caused by a factory or business which may be removed to another location, and those involving one caused by the operation of mines, quarries, and other enterprises for the development of the natural resources of land which must be conducted at a fixed place. An injunction should not be granted as readily in the latter as in the former class of cases.

—Brede v. Minnesota Crushed Stone Co. 375.

**Revocable License.**

5. A request that defendant quarry upon a certain portion of its premises is at most a license from those signing it, and is subject to revocation.

—Brede v. Minnesota Crushed Stone Co. 374.

**Similar Nuisance Immaterial.**

6. No great weight should be given to the fact that a person complaining of a nuisance came to it, or that others may be guilty of maintaining a similar nuisance in the same neighborhood.

—Brede v. Minnesota Crushed Stone Co. 375.

**Defense of Laches.**

7. The defense of laches is not available where for about two years plaintiffs have refrained from taking any action to restrain defendant from continuing to operate its quarry in the manner complained of and it has expended a large sum of money in making permanent improvements on the property where it conducts its business.

—Brede v. Minnesota Crushed Stone Co. 374.

**OPTION.** See Contract, 4; Vendor and Purchaser, 7.

**PARENT AND CHILD.**

Custody of Child. See Habeas Corpus, 2, 3.

Minor Children of Woman Employee Not Excluded from the Provisions of the Workmen's Compensation Act. See Workmen's Compensation Act, 9.

**PARTIES TO ACTION.**

Director General of Railroads. See Railway, 1, 2.

Insurance Company Had a Right to Intervene in an Action on a Premium Note which an Agent Had Assigned after Maturity without Authority. See Bills and Notes, 9.

In Action In Replevin, Creditor who Directed Attachment May Be Joined as Defendant. See Replevin, 1.

Defect of Parties Waived.

Where fifty-four persons and two estates were parties plaintiff in an action, the two estates may be stricken out. The fifty-four individuals clearly had legal capacity to sue, even if the two estates are stricken out or the words describing them are regarded as surplusage. If the successors in interest of the two decedents had an interest in the cause of action, this would only amount to a defect of parties, which has been waived by failing to prove it.

—Lee v. Scriver, 19, 20.

**PARTITION.**

When Sale Is Justified by the Evidence.

The statute prefers a partition of lands in kind to a sale of them and a division of the proceeds. A sale may be had when partition cannot be had without great prejudice to the owners. The evidence in this case tended to show difficulty in dividing the land sought to be partitioned into portions of equal value. There was an incumbrance covering the whole. The evidence sustains a finding that a partition could not be had without great prejudice and justifies a sale.

—Keyser v. Hage, 447.

**PARTNERSHIP.** See Joint Adventure, 2, 3.

Purchase of Land for Resale.

1. An agreement by two parties to combine their money, efforts, skill, and knowledge, and purchase land for the purpose of reselling or

**PARTNERSHIP—Continued.**

dealing with at a profit, is a partnership agreement, or a joint adventure having in general the legal incidents of a partnership. The title may stand in one or in both. The agreements may relate to a designated tract or to lands generally.

—Hammel v. Feigh, 117.

**Joint Contribution.**

2. It is essential that there be a joint contribution to the partnership enterprise, and something in the nature of a community interest in it and its results.

—Hammel v. Feigh, 118.

**Sharing of Profits.**

3. A sharing in profits does not necessarily make a partnership.

—Hammel v. Feigh, 118.

**Parol Contract as to Tract of Land. See Frauds (Statute of), 2, 3.**

4. The evidence sustains a finding that there was a partnership by oral agreement between the plaintiff Hammel, and Feigh, the original defendant, now deceased, in whose name title was taken in a particular tract of land upon which a mine was developed.

—Hammel v. Feigh, 116.

**PAYMENT.**

By Check on Cash Sale Conditional. See Sale, 4.

Receipt and Release in Full Printed on Face of Check. See Release, 1.

**PERPETUITIES.**

Inapplicable to Burying Ground.

The law against suspending the power of alienation is hardly applicable to the plot of ground wherein rest the dead. At least the space actually occupied by the grave is not a matter of barter and sale.

—Little v. Universalist Convention of Minnesota, 302.

**PHYSICIAN AND SURGEON.**

Prescribing Narcotic Drugs. See Poison, 1.

Liability for Continuance of Treatment.

1. A physician, if called generally, must give continued attention as the condition of the patient requires; if called only for an occasion he owes no duty to repeat his visit or continue his treatment. The evidence shows that defendant Portmann was called for particular occasions only. This did not affect his liability for what occurred on the occasions of his visits, but concerned only the question whether

**PHYSICIAN AND SURGEON—Continued.**

he owed a duty to give continued attendance. He was not liable for what was done by others during his absence.

—Nelson v. Farrish, 368, 371.

2. An allegation in the complaint that plaintiff's minor child was under the care of defendant physician "pursuant to solicitation and employment by plaintiff and his wife" amounts to an allegation that there were contractual relations between plaintiff and defendant.

—Skillings v. Allen, 325.

**When Insured Is under Treatment of Physician.** See Insurance, 8, 9.  
**Report of Physician to Insurer.** See Insurance, 10.

**Negligence in Treating Infectious Disease.**

3. A complaint states a cause of action when it is alleged therein that defendant, a physician, was employed by plaintiff to attend his minor daughter professionally while she was sick; that, knowing that the child's disease was scarlet fever, he negligently advised plaintiff's wife, who inquired in his behalf as well as in her own, that it was safe to visit the child, then in a hospital and under defendant's care; that he also advised her that it was safe to remove the child from the hospital to plaintiff's home, and that there was no danger that the disease would be communicated, although it was then at a stage when great danger of infection existed; and that plaintiff and his wife did not know of the infectious nature of the disease and relied on defendant's advice, and accordingly visited their child at the hospital and removed her to their home, and plaintiff thereby contracted scarlet fever to his damage.

—Skillings v. Allen, 323.

**Malpractice.**

4. Defendant Portmann's son treated the child on occasions and performed an operation. There is no claim of malpractice on his part and it is immaterial whether defendant Portmann was answerable for his acts.

—Nelson v. Farrish, 368.

5. The evidence produced was insufficient to make a case for the jury as to malpractice in the manipulation of the arm.

—Nelson v. Farrish, 368.

6. Action for malpractice in treatment of a child afflicted with osteomyelitis in the radius. It appears that the proper treatment was by operation. The court instructed the jury that if defendants made a correct diagnosis and advised an operation and it was refused, defendants were not liable, that if they failed to diagnose and treat the child with reasonable skill, and such failure resulted in injury,



**PHYSICIAN AND SURGEON—Continued.**

they were liable for damages. Under the evidence the instruction was proper. The question whether plaintiff had proven that a better result would have followed an operation was in the case. The evidence is such as to sustain a verdict for defendants.

—Nelson v. Farrish, 368.

**PLEADING.**

**Allegation of Knowledge of Dangerous Character of Poison and Defective Character of Label.** See *Poison*, 5.

**Of Custom.** See *Custom*.

**Complaint.** See *Broker*, 3; *Death by Wrongful Act*; *Physician and Surgeon*, 2, 3; *Poison*, 4, 5; *Replevin*, 3, 4.

**Making Allegation More Definite.** See *Corporation*, 1.

**Pleading By-Law.** See *Corporation*, 1(2).

1. Upon an objection to a complaint upon the ground that the facts alleged do not state a cause of action first made after the impaneling of the jury and when the taking of evidence is commencing, every reasonable intendment is indulged in favor of its sufficiency. Applying this rule it is held that a complaint which alleged that the plaintiff had a cause of action against another for fraud, that the defendant, employed as his counsel to prosecute it, understood that such other had threatened to obtain a discharge in bankruptcy, and would do so and avoid liability unless the action were so conducted that it would result in a judgment based on fraud and therefore not dischargeable, that suit was brought and a verdict rendered for the plaintiff, and that the proceeding was so negligently conducted that the verdict was lost to the plaintiff, is sufficient, although it was not directly alleged that the verdict was based on contract instead of on fraud, nor that the defendant in the action received a discharge in bankruptcy.

—Ziegler v. Cray, 45.

**Complaint in Intervention.** See *Bills and Notes*, 9.

**Answer.** See *State*.

**Demurrer.** See *Pleading*, 5.

**Departure.**

2. A reply denying that settlement of all claims under the policy had been made, and alleging that, if a release of the claim of the insured was given, it was procured by the fraud of an agent of the insurer, is not a departure from the complaint, which alleged that no payment of the claim had been made.

—Rechtzigel v. National Casualty Co. 303.

**PLEADING—Continued.****Amendment.**

3. A proposed amendment to the answer, by adding a paragraph which failed to state a valid defense, alleging that plaintiff had negligently failed to collect from the contractor the monthly payments specified in the contract, and thereby had released defendant from liability on its bond, which was objected to on the ground that it was inconsistent with the answer and with the theory on which the case had been tried, offered after the evidence had been completed, was properly disallowed.

—American Brick & Tile Co. v. Turnell, 96, 102.

**Time for Filing Cross-Complaint.**

4. Action for balance of contract price on paving contract between partnership and defendant city. Answer by surety on contractor's bond. Motion made one year later by surety to permit it to file cross-complaint to include another paving contract between a corporation with the same name as the partnership and defendant city. Motion denied. Held: No abuse of discretion on the part of the trial court.

—Ganley v. City of Pipestone, 361.

**Judgment upon Pleadings. See Pleading, 6.**

5. A motion for judgment on the pleadings is in the nature of a demurrer and admits the facts well pleaded.

—State v. Schurz, 221.

**Motion to Strike Out.**

6. Action upon a promissory note given to the state for binding twine, under a contract executed pursuant to G. S. 1913, § 9313. The answer admitted giving the note, and alleged in effect a modification of the contract, in that before defendant had removed any of the binding twine from the freight car, plaintiff's agent for the handling of the state's output of twine and implements stated to defendant that there was a shortage of twine for that season, and therefore plaintiff desired that defendant should reduce the amount of his order from 40,000 pounds to 20,000 pounds and allow plaintiff to ship the extra 20,000 pounds to other dealers and farmers; and it agreed to credit defendant upon his note with the contract price of the twine so taken and reshipped; in consideration of which defendant consented to a reduction of his order and allowed the state by its agent to reship the balance of the twine to other farmers and dealers; that the value of the twine so reshipped was \$3,355 and should be credited on the note; and to that extent the consideration of the note had failed. Plaintiff's motion to strike out these allegations and for judgment upon the pleadings was granted. Held: The court below erred in granting the motion to strike out, and in grant-

**PLEADING—Continued.**

ing judgment upon the pleadings as prayed in the complaint.

—State v. Schurz, 218.

**Sham Answer.**

7. Where payment of a check given on the purchase of a tractor was refused and thereafter the seller asserted ownership of the property and offered it for sale to a third party in whose possession it then was, but subsequently brought suit on the check, an answer alleging no consideration for the check should not be stricken out as sham, as the buyer's claim that the seller had rescinded the sale is not clearly shown to be unfounded.

—J. I. Case Threshing Machine Co. v. Bargabos, 8.

8. An answer can be stricken out as sham only when it appears clearly and indisputably that there is no issue of fact for trial.

—J. I. Case Threshing Machine Co. v. Bargabos, 8.

**Order to Make More Definite.**

9. Orders requiring a pleading to be made more definite and certain rest largely in the discretion of the trial court.

—Baer v. Waseca Milling Co. 485.

**Variance. See Broker, 3.**

10. Under our statutes pleadings are construed liberally, and a variance is not fatal unless the pleading alleges a cause of action different from that proven or actually misleads the adverse party.

—McRae v. Feigh, 246.

**POISON.**

**Sale of Narcotics. See Criminal Law, 7.**

**Furnishing Narcotic Drugs.**

1. Section 1, chapter 260, Laws 1915, forbids the sale of narcotic drugs, but provides that pharmacists may dispense the same upon the written prescription of a physician and that a physician may administer such drug to a patient upon whom he is in professional attendance. There are exacting requirements as to records to be kept in both cases. Section 2 forbids any physician to furnish or prescribe any such drugs for the use of a habitual user, provided this shall not prevent a physician from prescribing in good faith for the use of any patient for treatment of the drug habit such substances as he may deem necessary. Held:

It was proper to instruct the jury that the statute makes a distinction between the dispensation of these drugs to habitual users and to ordinary patients; that in the case of patients not addicted the physician may prescribe them and also furnish them, but that in case of habitual users he may not furnish the drug but may only

**POISON—Continued.**

give a prescription to be filled by a pharmacist under the safeguards imposed by the law.

—State v. Whipple, 403.

**Notice of Danger Given by Name.**

2. There are substances so generally known and recognized as dangerous that no warning need be given, except that furnished by vending them under their true name, such as gunpowder, carbolic acid and the like.

—McCrossin v. Noyes Bros. & Cutler, Inc. 184.

**Duty of Manufacturer and Vendor to Give Notice of Danger.**

3. A manufacturer of an article or compound imminently dangerous in kind owes to the public a positive and active duty to limit the danger, by labeling or otherwise conveying knowledge of the danger; and a like duty rests upon a vendor, who knows of the dangerous qualities of the article sold by him, and knows that its label or name does not adequately convey knowledge to the purchaser or public of such danger.

—McCrossin v. Noyes Bros. & Cutler, Inc. 181, 185.

4. In this action for wrongful death against the vendor of such compound, the complaint does not charge a violation of section 5039, G. S. 1913, since there are no allegations that Roach Doom, the compound sold and the one causing the death, contained any of the drugs specified in the section or any "commonly recognized poisons."

—McCrossin v. Noyes Bros. & Cutler, Inc. 181.

5. The complaint is held defective in not alleging that the compound sold was imminently dangerous, and in alleging in the alternative that defendant knew, or in the exercise of due care ought to have known, of the dangerous qualities, and in failing to allege positively the misleading or defective character of the label.

—McCrossin v. Noyes Bros. & Cutler, Inc. 182.

**"Prescribe" and "Furnish."**

6. The words "prescribe" and "furnish," as used in Laws 1915, c. 260, § 2 (G. S. Supp. 1917, § 8965—2), which forbids any physician to prescribe or furnish narcotic drugs for use of an habitual user, are used in their ordinary sense; "prescribe" meaning to give medical direction, to indicate remedies, and "furnish" meaning to supply or provide.

—State v. Whipple, 404, 406.

**Vendor Not Required to Know Ingredients of Compound Sold.**

7. In the absence of some statutory obligation, a vendor of another's proprietary compound owes no duty to the purchaser or the public to

**POISON—Continued.**

ascertain whether it contains ingredients that may be harmful or dangerous, if the compound be used for purposes other than those for which it was designed.

—McCrossin v. Noyes Bros. & Cutler, Inc. 181.

**Evidence.**

8. The court refused to receive in evidence a stamp with which defendant said he stamped all containers of such drugs dispensed by him. A package found on the person to whom it is charged defendant sold morphine bore no stamp, but it is admitted that defendant furnished him the quantity of the drug found in his possession. Held, no error.

—State v. Whipple, 403.

**POLICE POWER.**

Exercise by Municipal Board or Officer. See Municipal Corporation, 9.

**POSTMASTER GENERAL.**

Authority to Fix Intrastate Telephone Rates. See Telegraph and Telephone.

**PRINCIPAL AND AGENT. See Physician and Surgeon, 4; Release.**

Authority of Agent. See Contract, 16; Vendor and Purchaser, 6.

Authority of Agent to Extend the Time of Payment of Claims Held by Him for Collection. See Contract, 2.

The agent of the owner of the building had authority to waive the writing, and the evidence justified the trial court in finding that he did so.

—Walberg v. Jacobson, 211.

Ratification of Agent's Acts. See Contract, 16(1).

Ratification of Contract of Employment by President and Other Officers of a Trust Company. See Bank and Banking, 9.

**PRINCIPAL AND SURETY.**

Motion of Surety to File Cross-Complaint Denied. See Pleading, 4.

Liability of Surety Company Similar to that of Insurance Company.

The obligations of a surety engaged in the business of writing bonds for profit are governed by the laws governing insurance contracts.

—American Brick & Tile Co. v. Turnell, 97.

Surety Company Not Released by Default of Contractor. See Drain, 3.

Release of Surety by Negligence of Contractor. See Pleading, 3.

Bound on Bond in Proceedings for Writ of Error from the United States Supreme Court. See Appeal and Error, 20.

**PROCESS.****Summons.**

**Summons with Word "Days" Omitted.** See Judgment, 1.

A summons is not process, but merely a notice to defendant that an action against him has been commenced and that judgment will be taken against him if he fails to answer. It is sufficient if it clearly informs him that it is intended for him and requires him to answer the complaint. The statute prescribing its requisites is to be liberally construed, there being no general rule as to what defects are jurisdictional.

—Flanery v. Kusha, 308, 310.

**PUBLIC LAND.**

**Trust Patents under the Indian Allotment Act of February 8, 1887, to Half-Breed Indians Do Not Convey a Marketable Title on Their Face.** See Vendor and Purchaser, 10, 11.

**PUBLIC POLICY.** Antenuptial Contract Not against Public Policy. See Husband and Wife, 1.

**RAILROAD AND WAREHOUSE COMMISSION.**

**Commission's Consent to Reduction in Tariff Rates Unnecessary.** See Carrier, 4, 6.

**Commission's Consent to Reinstatement of Higher Tariff Rate Necessary.** See Carrier, 5.

After the passage of Laws 1905, p. 225, c. 176, relative to freight rates, it was the practice, when a new tariff was filed with the commission, to stamp it "filed," with the date of filing, and to send the carrier a written acknowledgment of the receipt of the tariff, provided the clerks in the office, in checking it over, discovered no change in existing rates or rules. If changes were discovered, the receipt was withheld, and the carrier notified that they were not approved and to make application in writing for leave to make them. Held: The mere filing of tariffs with the commission was not a compliance with the provisions of the act mentioned.

—National Elevator Co. v. Chicago, Milwaukee & St. Paul Railway Co. 165.

**RAILWAY.**

**Switching Charges of Connecting Carriers.** See Carrier, 1.

**Action against Company while under Federal Control.**

1. The act of Congress of March 21, 1918, providing for the operation of transportation systems while under Federal control, provides that

**RAILWAY—Continued.**

actions at law may be brought against carriers and judgment rendered "as now provided by law." Order No. 50 issued by the Director General of Railroads October 28, 1918, required that actions for death or injury to person growing out of the possession, control or operation of any railroad by the director general shall be brought against the director general and not otherwise. Insofar as such order prohibits the maintenance of such an action against the railroad company, it is in conflict with Act of Congress of March 21, 1918, and is void.

—Lavalley v. Northern Pacific Railway Co. 74.

**Substitution of Director General.**

2. Following Lavalley v. N. P. Ry. Co., 143 Minn. 74, 172 N. W. 918, it is held that the court erred in dismissing the action as to the railroad company, which was named as the original defendant, and substituting the Director General of Railroads as defendant.

—Gowan v. McAdoo, 228.

**Company to Keep Sharp Watch at Highway Crossing.**

3. A vigilant outlook should be kept in operating trains where the presence of persons on or near the track is to be anticipated as reasonably probable, notwithstanding the fact that a railroad company has the right of way at highway crossings. This right of precedence does not impose upon the traveler the whole duty of avoiding collisions, but both parties must exercise reasonable care to prevent injury.

—Gowan v. McAdoo, 227.

**Maintenance of Highway Crossing.**

4. Railroad companies are required by G. S. 1913, §§ 4256, 4257, to maintain grade crossings in a safe and passable condition, easy for teams and vehicles to cross, and to maintain planks between the rails level with the tops of the rails. The planking at a crossing was below the required level, and the runners of a sleigh driven over it would stick on the rails, thus retarding its motion. Held, that if, as a consequence of the condition described, an occupant of a sleigh was injured because it was delayed in getting over the crossing in time to escape being struck by an approaching train, the railroad company would be liable to him for negligence in the maintenance of the crossing.

—Gowan v. McAdoo, 227.

**Bell or Gates at Highway Crossing.**

6. Whether, in the exercise of reasonable care, a railroad company should maintain gates, a bell, or a flagman at a grade crossing de-

**RAILWAY—Continued.**

pend upon the circumstances of each particular case and may present a question for the jury, even though the maintenance thereof is not required by any statute, ordinance or order of the Railroad and Warehouse Commission. In this case it was proper to leave the question to the jury.

—Gowan v. McAdoo, 228, 232.

**Accident at Highway Crossing. See Negligence, 3.**

6. A jury may properly find that a train was negligently operated if it was run at a high rate of speed over a much-traveled village highway crossing where it struck a sleigh, which neither the engineer nor fireman observed until the team was on the track, although for a mile north of the crossing the track was straight, the train was running south, the team was approaching the crossing at a walk, and might have been seen by the fireman after it reached a point 21 feet from the track.

—Gowan v. McAdoo, 227.

7. The fact that the driver of a vehicle used to carry school children to and from school was guilty of negligence in driving upon a railroad track at a highway crossing does not defeat a recovery against the railroad company by a child injured because the engine struck the vehicle, if the company was also guilty of negligence which concurred with that of the driver to bring about a collision, and it would not have taken place but for such concurring negligence.

—Gowan v. McAdoo, 228.

8. In an action for death by wrongful act, the trial court, at the close of plaintiff's case, directed the jury to return a verdict for the defendant, upon the ground that it conclusively appeared that plaintiff's intestate was guilty of contributory negligence. Evidence that deceased brought his automobile almost to a full stop at a point within six or seven feet of the track, then shot ahead in an endeavor to cross it ahead of a locomotive running 40 or 50 miles an hour on a descending grade, justified the instruction.

—Wesler v. Chicago, St. Paul, Minneapolis & Omaha Railway Co. 159, 160, 161.

**Negligence of Engineer and Fireman. See Master and Servant, 5.****RECEIVER.****Appointment Not Warranted.**

Plaintiff sought the appointment of a receiver to collect and pay to him his share of the royalties which should accrue in the future, and



**RECEIVER—Continued.**

appealed from an order denying a new trial of this issue. Held, that the facts shown did not entitle plaintiff to such relief.

—McRae v. Feigh, 242.

**RECORD.**

Registration of Title. See Registration of Title.

**RED CROSS SOCIETY.** See War, 1, 2.

**REGISTRATION OF TITLE.****Partnership in Land Not Affected by Registration.**

The registration of the land under the Torrens system, made with the consent of the plaintiff and with the understanding that it should not affect his rights, did not affect them; and if there was a partnership in the property before registration there was afterwards. This holding does not trench upon the well recognized theory that a Torrens decree creates an indefeasible title and is not merely evidence of title.

—Hammel v. Feigh, 116.

**RELEASE.** See Insurance, 10, 11.

For Loss of One Eye Not a Bar to a Claim for Loss of the Other Eye.  
See Workmen's Compensation Act, 4.

1. Defendant paid plaintiff \$100 by check. Printed on the face of the check was the statement that by receiving and indorsing it the payee made "a full compromise settlement and release \* \* \* of any and all claims" under defendant's policy of accident insurance. Plaintiff also signed a proposal for a settlement in full. Action on the policy. Defense that the claim had been thus settled. Reply that plaintiff was induced to sign the proposal by the fraud of defendant's agent, who stated to plaintiff it was a receipt for the \$100 check, and that he was ignorant of its actual terms. Evidence of four witnesses for defendant that plaintiff sought to obtain a settlement of his claim in full without solicitation by anyone representing defendant, and that no false statement or deception was practiced in getting plaintiff's signature to the proposal or the check. Plaintiff was alone in testifying to the fraud upon him. The court instructed the jury that plaintiff could not recover unless he proved he was led to sign the proposal and accept and indorse the check by reason of the fraud practiced on him and that he must establish the alleged fraud "by a fair preponderance of clear and convincing evidence."

**RELEASE—Continued.**

Verdict in favor of plaintiff. Held: There was sufficient evidence to sustain the verdict.

—*Rechtzigel v. National Casualty Co.* 305, 306.

2. Defendants paid plaintiff \$2,500 in settlement and received a release of all claims for damages. Four days later the money was tendered back to them on the ground that plaintiff was mentally incompetent to make the settlement, but refused. The settlement was set up as a bar to the action. The court instructed the jury that plaintiff was presumed to have had sufficient mental capacity to make the settlement, and it was binding on him, unless he established "by clear and convincing evidence that by reason of the condition of his mind at the time he executed the release he did not know or understand what he was doing." Verdict for plaintiff. Held: There was enough evidence tending to show mental incompetence to make that issue a question for the jury.

—*Johnson v. Brastad*, 334.

Pleading. See Pleading, 2.

**REPLEVIN.****Who May Be Joined as Defendants.**

1. Replevin must be directed against a party in possession, but others interested, though not in possession, may be joined as defendants. In replevin against an attaching officer in possession, an attaching creditor who directed the attachment to be made may be joined as a defendant.

—*Northern Timber Products Co. v. Stone-Ordean-Wells Co.* 200.

**Joinder of Causes of Action.**

2. Damages to plaintiff's business and credit are too remote and speculative for recovery. The complaint alleges no facts for recovery of punitive damages. It does allege as damages the loss of the use of the property by reason of its detention. In substance the complaint states a cause of action against both defendants for replevin of property and for damages for its detention. This is but a single cause of action. That some of the allegations are labeled "second cause of action" is not important. The complaint is not subject to the objection that causes of action are improperly united and it is not demurrable.

—*Northern Timber Products Co. v. Stone-Ordean-Wells Co.* 200.

Demand for Possession. See Replevin, 3.

**Complaint Sufficient.**

3. Plaintiff alleges that defendant sheriff, holding a writ of attachment in a suit by defendant company against others, at the direction of

**REPLEVIN—Continued.**

defendant company, attached plaintiff's property and took it into his possession, and withholds possession from plaintiff, that defendants knew or should have known that plaintiff was the owner, and that plaintiff's business and credit were injured. Judgment for return of the property is demanded. **Held:** The complaint states a good cause of action in replevin. It is not necessary that the plaintiff ask for the immediate delivery of the property.

—Northern Timber Products Co. v. Stone-Ordean-Wells Co. 200.

**Pleading.**

4. An allegation in a complaint in replevin that the property has been detained by an attachment and plaintiff claims as damages "interest on the value of the timber during the period of attachment" is, crudely stated, substantially an allegation and claim of damages against defendants for the value of the use of the property by reason of its detention.

—Northern Timber Products Co. v. Stone-Ordean-Wells Co. 202.

**RESIDENCE.**

**Free Exercise of Volition Necessary to Acquire or Lose a Residence.**  
**See Homestead, 6.**

**RESTRAINT OF TRADE.** **See Contract, 8-10.**

**RIPARIAN RIGHT.** **See Navigable Water, 1.**

**Lease of Riparian Rights of Vendee in an Executory Contract of Sale to His Vendor Is Not Affected by Subsequent Deed from the Vendor in Performance of the Contract.** **See Deed.**

**RULE OF COURT.** **See Appeal and Error, 1.**

**SALE.** **When Contract of Sale Is Assignable.** **See Assignment, 1.**

**When Parties Are Estopped from Denying Assignability of Contract of Sale.** **See Assignment, 6.**

1. A mistake relating merely to the attributes, quality or value of the subject of a sale, or respecting a matter of inducement to the making of the contract, is not sufficient to authorize a court to rescind the contract at the suit of the aggrieved party, where the means of information were open alike to both parties, and there was no concealment of facts or imposition.

—Costello v. Sykes, 109.

**SALE—Continued.**

2. If the parties were mistaken only as to some point which did not affect the substance of the transaction between them, or go to the root of the matter involved, no case for rescission is presented.

—Costello v. Sykes, 109.

**Option of Buyer to Increase Quantity of Goods Specified in Sale Contract.** See Contract, 4.

**Place of Delivery.**

3. One who buys personal property then on the premises of a third party must take the property where it then is unless he stipulates for a different place or manner of delivery.

—J. I. Case Threshing Machine Co. v. Bargabos, 8, 10.

**In One State for Delivery on Board Cars in Another State.** See Commerce, 1, 2.

**Rescission of Sale for Nonpayment.**

4. Where on a cash sale the buyer gives his check for the purchase price, the payment is conditional only, and if the check be not paid the seller may rescind the sale and retain or retake his goods.

—J. I. Case Threshing Machine Co. v. Bargabos, 8.

5. Plaintiff sold a tractor to a third person and in part payment agreed to take an old steam engine from him. As part of the transaction plaintiff made a contract with defendant by which defendant's firm agreed to take the engine and pay plaintiff the difference between the price of the tractor and the money paid by the buyer. Defendant gave plaintiff a check for the amount agreed on. Afterward his demand of plaintiff for a bill of sale of the engine was refused, and defendant stopped payment of the check. After payment had been refused, plaintiff, claiming to be the owner of the engine, offered to sell it back to its former owner. Then plaintiff directed the former owner to deliver the engine to defendant and brought suit on the check. Held: The seller may rescind the sale by any overt act evincing an intention to do so, and if he rescinds the sale he cannot enforce payment of the check thereafter.

—J. I. Case Threshing Machine Co. v. Bargabos, 8, 9.

**Attempted Sale to a Third Person after Nonpayment of Check Given by First Purchaser.** See Pleading, 7.

**Right to Bill of Sale.**

6. The buyer is not entitled to a bill of sale unless the contract provides for it.

—J. I. Case Threshing Machine Co. v. Bargabos, 8.

**SALE—Continued.****Oral Modification of Written Contract.**

7. By written memorandum defendant, a dealer in feed at Minneapolis, sold and agreed to ship 300 tons of bran at \$28 per ton to plaintiffs, delivery at Boston or Boston rate points. The bran was not shipped as requested or within a reasonable time. Plaintiffs alleged an oral modification of the contract whereby the shipment should be made during the last 12 days of April, 1917. Sixty tons were shipped when the modification was made. No further shipments were made, although plaintiffs demanded performance several times during the month of May. A custom in the feed trade requires 24 hours' written notice that the merchandise would be procured in the open market and the seller held for the loss before either seller or buyer may be held to have breached the contract. Such notice was not given. In this action for damages it is held:

(1) It was competent to prove the alleged oral modification, though the contract was written and within the statute of frauds.

(2) The custom of the trade entered into the terms of the contract, and under a denial of a breach of the contract, evidence of this custom under which breach was disproved was admissible.

(3) There was nothing irreconcilable between the terms of the oral modification alleged and the operation of the custom proven. And, further, plaintiffs' insistence upon performance of the contract after the time specified in the modification waived the time, and clearly put in operation the custom referred to.

—McDonald v. Union Hay Co. 40, 41.

**Breach of Warranty—Evidence.**

8. Action on express warranty of a carload of corn as sound, sold by sample. Evidence that the corn was spoiled and of no value. Held: The correspondence leading up to the contract and the telephone conversation between the parties were properly admitted in evidence, and the evidence sustained the verdict in favor of plaintiff.

—Cherry v. Hales & Edwards Co. 481.

**Action for Price. See Contract, 11.**

9. Action for price of silo material delivered. Defendant claimed plaintiff agreed to pay half the freight and provide a man to erect the silo. The court charged that if plaintiff failed to carry out its part of the agreement, and thereby defendant refused to accept, then defendant was not required to pay for it. Verdict for defendant. Held: Under the issues and the law as submitted to the jury, and to which no exception was taken, the verdict finds sufficient support in the evidence.

—Farmers Handy Wagon Co. v. Askegaard, 14.

**SCHOOL AND SCHOOL DISTRICT.**

**Judgment for Costs against Defendant County in Proceeding for Formation of School District Vacated. See Costs.**

**Consolidation of Districts. See Statute, 2, 3.**

1. In 1911 a meeting was held in School District 58 and by a majority of voters determined to unite with District 47. From that time on the officers of the county and of the former school district treated the matter as if a legal consolidation had been fully and effectively carried out. So did the voters, and School District 47 was regarded as embracing the territory of the two districts. The school house in District 58 was not thereafter used for school purposes. **Held:** Both the county board and the trial court were bound to regard the status of School District 47 as if the union of 1911 had been effected with all the formalities prescribed by law.

—Independent School District No. 47 of Meeker County v. Meeker County, 170, 171, 172.

2. Proceeding under Laws 1917, p. 757, c. 453, to consolidate two school districts. It was contended that the language of the statute is such that, at present, it can apply only to the city of Granite Falls, and that by its terms it cannot become applicable to any city or village which may hereafter come into the same class. **Held:** There is no apparent impropriety in placing in a class by themselves villages and fourth class cities, having wholly or in part, within their limits, two or more school districts, one of them a high school.

—State ex rel. v. Independent School District of Granite Falls, 435.

3. It was within the province of the board of county commissioners to determine whether the educational advantages to be obtained in the Dassel school outweighed the dangers, difficulties and expense the people of District 58 would have to be subjected to in order to continue their connection with District 47. It is not within the province of the trial court to do so.

—Independent School District No. 47 of Meeker County v. Meeker County, 172.

**Detaching Territory from District.**

4. The board of county commissioners, on petition, detached certain territory from a school district formed in 1911 by two districts uniting. Upon appeal the order of the county board was reversed. It is held:

(1) Under the rules governing the trial of such appeals, the evidence did not warrant the court in finding that the board acted arbitrarily, unreasonably, or against the best interests of the people

**SCHOOL AND SCHOOL DISTRICT—Continued.**

in the territory affected, unless it was proper to receive and consider the testimony of two members of the county board, by whose affirmative vote the territory was detached, that they so voted because of the belief that the union of the two districts in 1911 was void and illegal.

(2) The testimony of the two members of the county board was admissible and warranted the finding made by the trial court.

—Independent School District No. 47 of Meeker County v. Meeker County, 169.

**Evidence as to Motive for Vote Admissible.**

5. When a law is passed by the requisite vote, the courts must accept it as valid, regardless of the motives or reasons of the persons who voted for it, unless it violates some constitutional provision. But on appeal from an order of the county board detaching territory from a school district, the statute gives the court express authority to review the action of the board, and whenever the motive or reason for a person's act is a direct issue, he may according to the generally accepted rule, testify thereto. In Minnesota the clerk of the board (97 Minn. 378, 107 N. W. 151), the members of the assessment board (95 Minn. 503, 510, 104 N. W. 553; 51 Minn. 539, 53 N. W. 800), have testified.

—Independent School District No. 47 of Meeker County v. Meeker County, 173.

**SEDITION ACT.**

Violation of Act of 1917. See War, 1-7.

**SET-OFF AND COUNTERCLAIM.**

The Right of Set-Off between the Parties to an Action Superior to the Claim of the Attorneys under the Lien Statute. See Attorney and Client, 5.

Lien of Attorney Extends to the Clear Balance Found to Be Due His Client. See Attorney and Client, 5.

Value of Beneficial Use of Land after Original Award May be Offset against Interest on Final Award from Date of Original Award. See Eminent Domain, 9.

The objection that counterclaims are not proper under G. S. 1913, § 7757, is waived if a settlement is made and the parties treat the demands upon which the counterclaims were founded as valid.

—Wildung v. Security Mortgage Co. of America, 251.

**STATE.**

**Defense to Action for Money.**

In an action by the state for the recovery of money, the defendant may in defense assert any claims which are connected with and arise out of the transaction sued upon.

—State v. Schurz, 220.

**STATUTE.**

Amendment of October 6, 1917, to the Federal Judicial Code Not Retroactive in Effect. See Admiralty, 4.

Object of Enactment of Laws 1905, p. 225, c. 176 (G. S. 1913, §§ 4290-4297). See Carrier, 2.

**Distinction between General and Special Laws.**

1. A law is general if the class to which it applies requires or justifies legislation peculiar to itself in the matters covered by the law. It is special if the classification is purely arbitrary.

—State ex rel. v. Independent School District of Granite Falls, 433.

**When Classification Comprises but One City.**

2. The fact that there is only one city now in the class is not decisive. If the statute is so framed as to apply automatically to other cities as they may acquire the characteristics of the class then the statute is general.

—State ex rel. v. Independent School District of Granite Falls, 433.

**Special Legislation. See School and School District, 2.**

**Act Not Special Legislation.**

3. Chapter 453, Laws 1917, relating to the consolidation of schools in any incorporated village or city of the fourth class which contains two or more school districts, situated wholly or in part within its limits, when only one of such districts maintains a high school, is not unconstitutional as special legislation.

—State ex rel. v. Independent School District of Granite Falls, 433.

**Subject of Act and Title.**

4. Chapter 212 of the Laws of 1917, providing for the protection and care of homeless children and for the regulation of societies receiving and placing them in suitable homes, and for the regulation and control of hospitals or places receiving and caring for women during confinement, is void, because it contains more than one subject.

—State v. Women's & Children's Hospital, 137.

5. A statute reading "when an incorporated village or a city of the fourth class contains two or more school districts," etc. has a future as well as a present application.

—State ex rel. v. Independent School District of Granite Falls, 435



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**SUICIDE.**

Conflicting Evidence. See Insurance, 13.

Evidence of Insured's Expressions on Subject Admissible. See Insurance, 14.

**TAXATION.**

Personal Judgment in Tax Proceeding Cannot Be Taken against a Person without Personal Service of Notice. See Taxation, 7.  
Upon Stockholder of National Bank.

1. The tax upon the stock of a national bank levied upon the stockholders under G. S. 1913, § 2018, is of the same character as other taxes upon personal property. This court has so held. *State v. Security Nat. Bank*, 139 Minn. 162, 165 N. W. 1067.

—*State v. Security National Bank of Minneapolis*, 412.

2. Absolute liability of a tax is the rule and is to be presumed. It should require clear language to relieve stockholders from taxation upon their stock in the event the corporation has made no earnings, or, having made them, has paid them over to the stockholders.

—*State v. Security National Bank*, 413.

3. On a former hearing it was held that a national bank cannot, under our statute, be required to pay an assessment levied upon its stock, unless it has in its hands earnings, or, at least, assets of some sort, belonging to the stockholders. It was further held that the stock involved in this case was subject to taxation for the year 1915. This decision is followed.

—*State v. Security National Bank*, 408.

4. The tax in such case is not against the bank, nor in rem against the stock, but is a tax against the stockholder of the bank on account of the ownership of the stock, and the bank is constituted a tax collector to collect the tax from the stockholder.

—*State v. Security National Bank*, 408.

5. The tax is an absolute liability of the stockholder. Its vitality does not depend upon the contingency of the bank's having assets of the stockholder from which it may be required to make payment.

—*State v. Security National Bank*, 408.

6. A tax on stock assessed in the name of the bank is a valid tax, and is binding as such upon the stockholders. The validity of any method of procedure for collection of the tax levied in this case,

**TAXATION—Continued.**

other than the method which was pursued, is not before the court for decision.

—State v. Security National Bank, 409.

7. Personal judgment may not be taken against the stockholder for the tax without personal service of citation upon him. Personal service of notice, in the assessment and the levy of taxes, is not essential to due process of law. But in judicial proceedings notice before judgment is a fundamental right. A personal judgment in tax proceedings has all the elements of a judgment in personam, and personal notice is essential to jurisdiction to render it. The bank is not the agent of the stockholder to receive service of such notice. The judgment rendered in this case against stockholders without personal notice or attachment of property was without jurisdiction, and is void.

—State v. Security National Bank, 408.

**Redemption from Tax Sale.**

8. Defendant Craighead, having occupied the land in question for more than 20 years, had a sufficient basis for his claim to entitle him to make the redemption in controversy, although his fence had been removed several years before the redemption and he was not then in actual possession.

—Sunderman Investment Co. v. Craighead, 286.

9. The statute gives the right to redeem from a tax sale to "any person claiming an interest" in the land, and any person who in good faith claims an interest therein which would be cut off by the tax title may protect such interest by redeeming from the sale. G. S. 1913, § 2137.

—Sunderman Investment Co. v. Craighead, 286.

10. A redemption merely annuls the sale.

—Sunderman Investment Co. v. Craighead, 286.

**Inheritance Tax.**

11. The fundamental principle in the whole inheritance tax law is to exact a tax upon the clear amount in money value received by each beneficiary, legatee, or heir from a decedent's estate, by virtue of the provisions of a will, or the intestate law, or otherwise, as the tax reaches transfers made by a decedent in contemplation of death. It is not a tax upon the estate, but upon the privilege of receiving a portion thereof, and is to be computed on the clear value of the part received.

—State ex rel. v. Probate Court of Kandiyohi County, 80.

12. A beneficiary in a will may refuse to accept the portion given. No

**TAXATION—Continued.**

tax can be collected with respect to him, because there has been no transfer to him.

—State ex rel. v. Probate Court of Kandiyohi County, 81.

13. Where there is an outright purchase and assignment of a beneficiary's interest in an estate, it is but right that the tax which it was subject to in the hands of the assignor should be paid. But it would seem that a good faith compromise of a bona fide contest over the will, and upon no other consideration, is not properly an assignment of any interest in the estate, it not appearing that the compromise was made for the purpose of evading the tax.

—State ex rel. v. Probate Court of Kandiyohi County, 83.

14. The inheritance law no doubt intended that, when there was uncertainty or a contest, the tax should be computed according to the final adjudication between the parties.

—State ex rel. v. Probate Court of Kandiyohi County, 81.

15. In case of a contest between the beneficiaries named in the will, or where the instrument is attacked by one claiming under the intestate law, the practical proposition is that there is no actual transfer until the final decree of distribution is made, or until a court of competent jurisdiction determines the issue between the claimants. The decree so finally entered relates back and makes the transfer effectual as of the date of death.

—State ex rel. v. Probate Court of Kandiyohi County, 80.

16. The statute imposes a tax on any transfer of property "by will or intestate law." Where a will contest has been amicably settled between the beneficiaries named in the will, and they have in good faith stipulated for a decree of distribution in accordance with the settlement, and there is no intent to evade or reduce the inheritance tax, the tax should be computed upon the share received by each beneficiary under the decree.

—State ex rel. v. Probate Court of Kandiyohi County, 77.

**Payment.**

By Defendant Mortgagee as Condition to the Annulment of a Note and Mortgage. See Cancellation of Instrument.

**TELEGRAPH AND TELEPHONE.**

Telephone Conversation Admissible in Evidence. See Sale, 8.

Postmaster General May Fix Intrastate Telephone Rates.

Under the authority delegated by the President to the Postmaster General pursuant to the joint resolution of Congress of July 16, 1918, 40 St. 904, c. 154 [U. S. Comp. St. 1919 Supp., § 3115½x], authorizing the President to assume control of the telephone systems

**TELEGRAPH AND TELEPHONE—Continued.**

during the war, the Postmaster General in the exercise of such control had authority to fix intrastate telephone rates.

—State v. Tri-State Telephone & Telegraph Co. 141.

**TITLE.**

Marketable Title. See Vendor and Purchaser, 8-11.

**TOWN.**

Injunction to Restrain Obstruction of Swale by Embankment. See Injunction, 1.

**TRESPASS.**

1. It was proper to prove previous conviction of defendants who were witnesses for the purpose of impeachment, and, if the conviction arose out of trouble with plaintiff, proof of the trouble was admissible to show malice.

—Muenkel v. Muenkel, 29.

Evidence inadmissible..

2. A provoking remark by plaintiff, made before the first trouble, was properly rejected; there being no proof that it was communicated to defendants.

—Muenkel v. Muenkel, 29.

Evidence Admissible. See Evidence, 3.

3. It was proper to permit proof that the inmates of plaintiff's home were frightened. This evidence tended to characterize the violence of the acts done. It was also proper to prove that the effect on plaintiff's wife was such as to cause her partial incapacity to perform household duties.

—Muenkel v. Muenkel, 29.

4. There is evidence to sustain a verdict against defendants for assault upon plaintiff's home and property in the night-time by the throwing of rocks, accompanied by riotous language.

—Muenkel v. Muenkel, 29.

Charge to Jury.

5. It was proper for the court to charge that the acts complained of were criminal offenses.

—Muenkel v. Muenkel, 30.

Damages. See Damages, 4.

Punitive Damages.

6. That the court gave the jury no opportunity to assess punitive damages against the defendants separately is not ground for reversal.

—Muenkel v. Muenkel, 30.



**TRIAL.**

**Refusal to Strike Case from the Calendar.** See Appeal and Error, 4.  
**Order of Reception of Evidence Immaterial on Appeal.** See Appeal and Error, 10.

**Reading from the Record the Testimony of a Witness on a Former Trial Who Is No Longer within the Jurisdiction of the Court.** See Appeal and Error, 5.

**Limiting Number of Witnesses.**

1. The trial court should not attempt to limit the number of witnesses of a party upon the main controverted issue or controlling fact of a case, unless it becomes apparent that there is a purpose to trifle with the administration of justice. The main issue in this case was what defendant said on the evening in question, and it was prejudicial error to limit the number of his witnesses to 12 of the 27 he had produced to testify on that subject.

—State v. Randall, 203.

**Weight of Evidence.**

2. In determining what fact the testimony of a particular witness establishes or tends to establish, his whole evidence as brought out on direct and cross examination should be considered.

—Kivak v. Great Northern Railway Co. 197.

**Impropriety in Remarks of Counsel.** See New Trial, 2.

**Withdrawal of Issue of Fraud from Jury Not Reviewable when the Bill of Exceptions Does Not Contain the Evidence on That Issue.** See Appeal and Error, 8.

**Refusal to Charge Jury.** See Appeal and Error, 15; Bills and Notes, 12.

3. Error cannot be predicated upon the court's refusal to give a requested instruction containing a correct abstract statement of law which is not applicable to any of the issues in the case.

—McClure v. Village of Browns Valley, 339.

**Question for Jury.** See Appeal and Error, 8; Bills and Notes, 6; Bridge, 2; Contract, 16; Physician and Surgeon, 5; Railway, 5.

**When Evidence is Flatly Contradictory.** See Log and Logging.

**Question of Punitive Damages for Jury.** See Assault and Battery, 2.

**Charge to Jury.** See Carrier, 14, 15; Contract, 11; Criminal Law, 2; Gift, 2; Insurance, 12; Physician and Surgeon, 6; Poison, 1; Sale, 9.

4. The statement in the charge that plaintiff was entitled to the right of way at the time of the collision was not unduly prejudicial in view of the facts and of the remainder of the charge.

—Johnson v. Brastad, 332.

**TRIAL—Continued.**

Charge to Jury Not Argumentative. See Master and Servant, 8.  
 When Error in Amount of General Verdict Was Corrected on Appeal.  
 See Appeal and Error, 18.

5. Evidence not directly contradicted may not command a verdict, when the inferences to be drawn from all the circumstances may lead to different conclusions by reasonable men.

—McWethy v. Norby, 387.

**Findings of Fact.**

When in Favor of Plaintiff the Court on Appeal Must Take the Most Favorable View of the Evidence for Him. See Appeal and Error, 11.  
 No Appeal until after Motion for a New Trial or Entry of Judgment.  
 See Appeal and Error, 2.

**TROVER AND CONVERSION. See Attorney and Client, 4.**

Action to recover value of grain to which plaintiff claimed title under a chattel mortgage executed by the intervener and foreclosure of the mortgage. Verdict in favor of defendant and intervener. Motion for judgment notwithstanding the verdict granted, and appeal from the judgment. The intervener executed to plaintiff bank the note and chattel mortgage upon his undivided half in certain oats and wheat then in shock. In his complaint in intervention he alleged that the note represented the first payment on the purchase of another farm by him from plaintiff and its cashier, and that plaintiff and its cashier defrauded him in respect to the number of acres of tillable land. Held: The subsequent cancellation of the land contract for fraud cannot avail as a defense to either defendant or intervener.

—Citizens State Bank of Twin Valley v. Moebeck, 291, 297.

**TRUST.**

Validity of Contract when One Party Occupies a Fiduciary Relation to the Other. See Contract, 5-7.

**Deposit in Savings Bank.**

1. Where a depositor makes a deposit in a savings bank of his own money in his own name in trust for a relative and dies before the beneficiary without doing any decisive act to disaffirm the trust, a presumption arises that an absolute trust was created as to the balance remaining on deposit at the death of the depositor.

—Walso v. Latterner, 364.

**TRUST—Continued.**

2. The fact that the depositor had deposited in his personal account the maximum amount permitted by the bank before making this deposit, and that he could withdraw this deposit during his lifetime, and did withdraw a part of it, unaided by other evidence, is not sufficient to overcome this presumption.

—Walso v. Latterner, 364.

3. Nonexpert witnesses stated that if they began talking with decedent on a given subject, he would soon change to another subject, and that he was peculiar; that it was difficult to get him to set a price on his produce. Held: These facts did not tend to show that the depositor was incompetent to transact business, and their opinions as to his competency were properly excluded.

—Walso v. Latterner, 364.

Devise to a Religious Corporation Not a Trust. See Will.

**VARIANCE. See Pleading, 10.****VENDOR AND PURCHASER.**

**Lease of Riparian Rights of Vendee in an Executory Contract of Sale to His Vendor Not Affected by Subsequent Deed from the Vendor in Performance of the Contract. See Deed.**

**Rescission of Contract for Fraud of Vendor.**

1. Where the vendee in a contract for the purchase of a tract of land undertakes to and does personally examine the same as fully and completely as he chooses, and determines in his own mind the number of acres of tillable land as well as the number of acres of slough thereon, the same never having been measured and, having communicated his opinion thereof to the seller, who replied thereto that he believed that there were more acres of tillable land, and the vendee then enters into a contract for the purchase of the same, he cannot thereafter be heard to assert that he relied upon the representations of the seller as to the number of acres of tillable land, and thereby avoid the contract upon the ground of fraud.

—Citizens State Bank of Twin Valley v. Moebeck, 291.

**Cancellation of Executory Contract of Sale.**

2. An executory contract for the sale of land contained a stipulation that other lands owned by the vendor might be included therein, if within a time therein stated an outstanding contract to a third person should be canceled. The land in that contract was sold by defendant to a fourth person, but there was no cancellation by statutory notice or by consent of the parties. It is held that there was

**VENDOR AND PURCHASER—Continued.**

no cancelation of the outstanding contract as contemplated by the parties, and that the lands therein included did not therefore become a part of plaintiff's contract.

—*Wortham v. Minnesota Land Corporation*, 133.

**Equitable Title of Vendee in Executory Contract of Sale.**

3. An executory contract for the sale of land vests in the vendee an equitable title to the land; a title and interest which he may convey or otherwise transfer to others.

—*Greenfield v. Olson*, 275.

4. While an unsatisfied judgment for an instalment on an executory land contract will be discharged of record if the contract is terminated by the vendor, instalments paid may not be recovered.

—*Citizens State Bank of Twin Valley v. Moebeck*, 297.

**Foreclosure by Vendor.**

5. When a vendor, before an executory land contract is canceled, forecloses a chattel mortgage given by the vendee to secure his note, the amount realized on the foreclosure is applied by the law upon the debt, the note. But such instalment may not be recovered by the vendee when the vendor thereafter terminates the contract.

—*Citizens State Bank of Twin Valley v. Moebeck*, 297.

**Statutory Notice of Cancellation of Sale Contract.**

6. The statutory notice to terminate an executory contract of sale must undoubtedly be in writing, for a copy must be recorded. But there is no requirement that it state the amount due, or that it be signed personally by the vendor, or that the authority of the vendor's agent or attorney to give or sign the notice shall be in writing. Such notice signed "R. D. Barrett, Attorney for First National Bank, Northfield," held sufficient.

—*First National Bank, Northfield v. Coon*, 264.

7. Such a notice required the sum in default to be paid to plaintiff's attorney at his office in Minneapolis, while under the contract the purchase price was payable at Northfield. Held: The statute does not require the notice to designate a place for removing the default, and the notice could not change any of the terms of the contract, but the defendants had the option to pay to plaintiff at Northfield or to its attorney at Minneapolis, and they were not misled. The notice was in substantial conformity with G. S. 1913, § 8081.

—*First National Bank, Northfield v. Coon*, 265.

**Marketable Title. See Indian.**

8. A title that is imperfect of record and can be completed only by judicial decree founded upon parol evidence of extrinsic facts which may or may not be disputed, is not a clear title, and a vendee who is

**VENDOR AND PURCHASER—Continued.**

entitled by his contract to a marketable record title is not bound to accept the same. A marketable title to land is one that is fair of record and free from reasonable doubt.

—Geray v. Mahnomen Land Co. 386, 383.

9. Where the title depends for its validity on matters of fact dehors the record, the determination whereof requires a judicial decree, it is not marketable, and the vendee in an executory contract of sale is not bound to accept it.

—Geray v. Mahnomen Land Co. 383.

10. The rule applies to trust patents issued by the Federal government to certain Indians of the White Earth Indian Reservation under the "General Indian Allotment Act" of February 8, 1887, and acts supplementary thereto, which on their face do not convey the fee title.

—Geray v. Mahnomen Land Co. 383.

11. With that fact unsettled and undetermined, a title derived through a trust patent so issued is not marketable within the rule stated.

—Geray v. Mahnomen Land Co. 383.

**VILLAGE.**

President of Council Not Entitled to Testify as Owner to the Value of a Village Bridge. See Evidence, 10.

**WALL.**

Retaining Wall Necessitated by Change of Street Grade. See Eminent Domain, 2, 5.

**WAR.**

Violation of Sedition Act of 1917. See Criminal Law, 6.

1. Laws 1917, p. 764, c. 463, in reference to discouraging enlistment in the army or navy, was plainly not designed to force citizens to contribute to, or to join the Red Cross or any kindred association of whose valuable assistance the government availed itself through the war with Germany. Finding fault with either the government or the societies engaged in war activities is not made a crime, unless the criticism is made under such circumstances that it can be inferred that citizens were thereby taught not to aid the government.

—State v. Ludemann, 127.

2. Defendant had refused to join the Red Cross Association when requested to so do by a subcommittee, appointed through or by the association. He was reported to the head committee, whose four

**WAR—Continued.**

members visited defendant at his home for the stated purpose of obtaining from him his reasons for not joining, if he persisted in his refusal to join. For the language used in giving his reasons to the head committee, when so visited, defendant was convicted. No one but the members of the committee was present when the words were uttered. It is held: The circumstances under which the words were spoken exclude the inference that there was a teaching or advocating in violation of section 3, c. 463, Laws 1917.

—State v. Ludemann, 126.

3. The Sedition Act was not intended to deprive citizens of the right to talk about, discuss, speculate upon, or to even criticize matters pertaining to the war. The act plainly limits the restrictions upon free speech to teaching or advocating that men should not enlist as soldiers or sailors, and that citizens should not aid in the activities commended by the government for carrying on the war.

—State v. Delke, 26.

4. The evidence does not sustain a finding that the two defendants holding a conversation between themselves on their own property, in which they made disloyal and unpatriotic remarks, overheard by another, taught or advocated by oral speech that the citizens of the state should not aid and assist the United States in prosecuting or carrying on the war with its public enemies within the prohibition of Laws 1917, p. 764, c. 463.

—State v. Bernhard Rempel, 50.

5. The evidence does not sustain a finding that the defendant, who, while being taken to jail upon his arrest, made a derogatory remark about the government, nothing being said about the war or its prosecution, thereby advocated by oral speech that the citizens of the state should not aid the United States in prosecuting or carrying on the war with its public enemies within the prohibition of Laws 1917, p. 764, c. 463.

—State v. John Rempel, 52.

6. The defendant was convicted of violating chapter 463, Laws 1917, in a public address delivered on August 18, 1918, at Kenyon, Minnesota. The language employed is not essentially different from that spoken by Joseph Gilbert on the same occasion, resulting in his conviction, affirmed by this court. State v. Gilbert, 141 Minn. 263, 169 N. W. 790. Nearly all the errors assigned are identical with those assigned in the Gilbert case, and are ruled by the decision therein. Held: It was for the jury to say whether defendant, by using the language set out in the indictment, in connection with his

**WAR—Continued.**

other utterances at that meeting, went beyond the usual decrying of rival political parties and criticism of methods employed by those in office, and violated the statute.

—State v. Randall, 203.

7. The evidence is held insufficient to show a violation of chapter 463, p. 764, Laws 1917, known as the Sedition Act.

—State v. Delke, 23.

**WARRANTY.**

By Mortgagee that He Has a Subsisting Mortgage on Property Sold on Foreclosure. See Chattel Mortgage, 3.

No Warranty of Title on a Foreclosure Sale. See Chattel Mortgage, 3.

**WATER AND WATERCOURSE.****Drainage of Surface Water.**

When surface waters, in time of high water, do not take their natural course across a highway, because a swale across it has been dammed by earth from a neighboring county ditch which has been wasted thereon, in accordance with the statute, a landowner is not entitled to obtain culverts or openings through the highway in an action independent of the proceedings which established the ditch.

—Garrett v. Skorstad, 256.

**WILL.**

Refusal of Beneficiary to Accept Bequest or Devise. See Taxation, 12. Settlement of Contest as Affecting Inheritance Tax. See Taxation, 13-16. Devise to Religious Corporation.

A will of testatrix clearly discloses an intention that the religious corporation representing her faith should dispose of the bulk of her property for benevolent and religious purposes in accordance with the practice of such corporation. It is held that the devise should be construed as absolute to the corporation, and not in trust, although words importing a trust are used in the will. The direction that the property, consisting mainly of a valuable 160 acre farm, be sold and converted into a fund, only the income of which should be used for benevolent and religious purposes, merely follows the by-laws and practice of the corporation, and does not indicate a trust. Nor does the fact that one acre of the farm, the burial plot of herself and her father, is never to be sold, and that a part of the income from the fund is to be devoted to the care of the graves, compel the conclusion that the will proposes the creation of an il-

**WILL—Continued.**

legal trust, the corporation being empowered to take gifts of burial places and there being nothing in the will restricting the corporation from permitting other interments in the acre mentioned.

—Little v. Universalist Convention of Minnesota, 298.

**WITNESS.**

Failure of Accused to Testify in His Own Behalf. See Criminal Law, 1, 4, 5.

Limiting Number of Witnesses upon Main Issue of Case. See Trial, 1. Testimony of Chief Clerk of Bureau of Assessments of St. Paul Competent. See Municipal Corporation, 7.

Examination of Adverse Witness. See Witness, 3.

1. It was proper for plaintiff to ask his adverse witness whether a defendant told him to say "I don't know" to everything asked him while on the stand. His affirmative answer was properly received.

—Muenkel v. Muenkel, 31.

Testimony as to Contents of Lost Letter.

2. Respondent, an interested party, is not disqualified by G. S. 1913, § 8378, from testifying as to the contents of a lost letter acknowledging paternity.

—Anderson v. Oleson, 328.

Cross-Examination.

3. The court properly permitted cross-examination of an adverse witness by the party calling him.

—Muenkel v. Muenkel, 29.

4. Defendant was entitled to repeat, if he could, all that he said at a public meeting, when he was tried upon an indictment for violating the Sedition Act.

—State v. Randall, 203.

Impeachment. See Trespass, 1.

Disqualification of Party in Interest from Testifying Concerning Any Admission of Decedent, Does Not Refer to Contents of Lost Document. See Evidence, 7.

Objection to Questions Not Reviewable on Appeal when It Was Not Shown what His Testimony Would Be. See Appeal and Error, 6.

Rejection of Answer Not Reviewable unless It Appears the Answer Would Be Material and Favorable to Appellant. See Appeal and Error, 7.



**WORDS AND PHRASES.**

**Definition of the Word "Baggage."** See *Carrier*, 10.

**"Compensation" and "Damages" as Used in Section 8229, G. S. 1913 (Workmen's Compensation Act) Distinguished in Meaning.** See *Workmen's Compensation Act*, 2.

**Erasure of the Words "In Full" from Face of Check.** See *Accord and Satisfaction*, 2.

**Negotiation of Promissory Note "In Breach of Faith" within the Meaning of the Negotiable Instrument Act.** See *Bills and Notes*, 1.

**"Legal Liability for Damages" in Section 8229, G. S. 1913 (Workmen's Compensation Act).** See *Workmen's Compensation Act*, 2.

**Meaning of the Word "Member" as Applied to the Human Body.** See *Workmen's Compensation Act*, 6.

**Who Are to Be Regarded as "Orphans" within the Provisions of the Workmen's Compensation Act.** See *Workmen's Compensation Act*, 9.

**Meaning of Phrase "Owners of the Land Described in Such Petition" as Used in Laws 1917, p. 605, c. 441, § 4, in Reference to Drains.** See *Drain*, 1.

**Meaning of the Word "Policy" as Used in the Code of Health and Accident Insurance (G. S. 1913, §§ 3522-3535).** See *Insurance*, 2.

**Use of Words "Prescribe" and "Furnish" as Used in Act Regulating Use of Narcotic Drugs.** See *Poison*, 6.

**Negotiation of a Promissory Note "under Such Circumstances as Amount to a Fraud" within the Meaning of Negotiable Instrument Act.** See *Bills and Notes*, 1.

**WORKMEN'S COMPENSATION ACT.**

**When Landsman at Work in Loading Vessel Does Not Come within the Scope of the Act.** See *Admiralty*, 1-3.

**Action for Personal Injury.**

1. Where the answer does not present the question whether the rights of the parties are controlled by the *Workmen's Compensation Act*, and the evidence fails to bring them within its provisions, the act does not apply.

—*Palm v. City of Minneapolis*, 477, 478.

2. The phrase "legal liability for damages" in section 8229, G. S. 1913, has reference to the common law liability of a third person to the injured employee. The section clearly distinguishes between the meaning of the terms "compensation" and "damages."

—*Carlson v. Minneapolis Street Railway Co.* 133, 132.

**Accident Arising Out of Employment.**

3. Mrs. M. was an employee of relator hotel company and in charge of

**WORKMEN'S COMPENSATION ACT—Continued.**

the passenger and freight elevators of the hotel. She received wages, room and board at the hotel. While riding up and down and talking to the operator about 8 p. m. a passenger got off and she followed. The operator closed the door and was just starting up when she pushed open the door and tried to re-enter. She tripped and fell back into the pit to her death. Held: The evidence sustains the finding that she met death in the course of her employment from an accident arising out of it.

—State ex rel. v. District Court of Hennepin County, 144.

**Effect of Release for Loss of One Eye.**

4. A settlement made by the workman with his employer and the insurer of the employer on the mutual assumption that he was entitled to compensation for the loss of one eye only, and a release executed on the same assumption, do not bar him from thereafter claiming compensation for the injury to the other eye.

—Zinken v. Melrose Granite Co. 397.

**Permanent Partial Disability.**

5. A workman's left eye had been injured so that one-half of his ability to see with it was lost. Thereafter, in the course of his employment, both eyes were injured, the right so badly that it became necessary to remove it, and the left to such an extent that, although he is not totally blind, he can no longer follow any occupation. Held, that he is entitled to the compensation for permanent partial disability which is fixed by the schedule found in section 4, c. 209, Laws 1915, that the amount of compensation is not determined by the clause in the schedule covering the loss of one eye, but by the clause which provides that the compensation shall be 50 per cent. of the difference between the wage of the workman at the time of his injury and the wage he is able to earn in his partially disabled condition for a period not exceeding 300 weeks.

—Zinken v. Melrose Granite Co. 397.

6. In common usage the term "member," as applied to the human body, means the extremities of the body and particularly the arms and legs.

—Zinken v. Melrose Granite Co. 402.

**Finding Sustained by Evidence.**

7. A finding that lime was splashed into the eyes of a stone mason by a fellow workman and that both eyes were injured is sustained by the evidence.

—Zinken v. Melrose Granite Co. 397.

**WORKMEN'S COMPENSATION ACT—Continued.****Dependent.**

8. Children under 16 years are conclusively presumed dependents.

—State ex rel. v. District Court of Hennepin County, 144.

**Orphan.**

9. Where the employee accidentally killed is the mother of several children under 16 years of age, and the father had for several years prior to her death deserted the family, such children are to be regarded as orphans, coming within subdivision 10, § 5, c. 209, Laws 1915, for the purpose of fixing the amount to be paid under the Workmen's Compensation Act.

—State ex rel. v. District Court of Hennepin County, 144.

**Recovery by Employer from Third Party.**

10. Under the Workmen's Compensation Act, the employer's right to recover the amount which he was compelled to pay to his employee's dependents from a third party, whose act was the cause of the accident, depends upon whether the negligence of such third party was the proximate cause of the injury.

—Carlson v. Minneapolis Street Railway Co. 129.

**Election of Remedy by Injured Workman.**

11. Under the Workmen's Compensation Act, where an employee is injured in the course of his employment by the actionable negligence of a third party, a statutory remedy accrues to him or his dependents for compensation against his employer, and a common law remedy against such third party, though he cannot proceed against both. If he elects to pursue the former remedy, he waives the latter, and his employer is subrogated to the right.

—Carlson v. Minneapolis Street Railway Co. 130.

**WRIT.**

**Certiorari.** See Costs.

**Habeas Corpus.** See Criminal Law, 3; Habeas Corpus.

**Mandamus.** See Election, 1.

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